CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 123

CARL B. WILLIAMS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

No. 10825

United States
Circuit Court of Appeals
For the Ninth Circuit.

CARL B. WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Appellee. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

C-6759 Phoenix

Violation: 18 U.S.C. 548 (Rape)

United States of America
District of Arizona—ss.

INDICTMENT

In the District Court of the United States in and for the District of Arizona, at the October term, thereof A. D. 1943.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that Carl H. Williams, alias Reverend Carl A. Williams, on or about the 10th day of December, A. D. 1943, and within the said District of Arizona, upon and within the limits of the Colorado River Indian Reservation, did then and there wilfully, unlawfully and feloniously ravish and carnally know Geraldine Rose Ameelyenah, she, the said Geraldine Rose Ameelyenah, being then and there a female person and an Indian and under the age of eighteen years, and not being then and there the wife of the said Carl A. Williams, alias Reverand Carl A. Williams; contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney for
the District of Arizona.

[Endorsed]: Indictment. A True Bill. J. G. O'Malley, Foreman of the Grand Jury.

[Endorsed]: Filed Mar. 23, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By: Gertrude I. Bitting, Deputy Clerk. [4]

In the United States District Court
for the District of Arizona

April 1944 Term. Monday, April 3, 1944
At Phoenix
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

C-6759

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL H. WILLIAMS,
Defendant.

The defendant is present in person with his counsel John H. Corbin, Esquire, and is now duly arraigned. The defendant states that his true name

is Carl B. Williams, and It Is Ordered that further proceedings herein be conducted in the true name of the defendant. The defendant waives the reading of the indictment and a copy thereof is handed to him. The defendant's plea is not guilty, which plea is now duly entered. Thereupon, It is ordered that this case be and it is set for trial May 25, 1944. Subsequently, it is ordered that the order setting this case for trial be and it is vacated and it is ordered that this case be and it is set for trial Friday, May 26, 1944, at ten o'clock a.m. [5]

United States District Court,
District of Arizona

C-6759-Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

Against

CARL B. WILLIAMS,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Carl B. Williams, Guilty in the manner and form as charged in the Indictment.

W. H. SCHEUMACK
Foreman.

[Endorsed]: Filed Jun. 22, 1944. [6]

In the District Court of the United States,
For the District of Arizona

C-6759 Phx

Violation: 18 U.S.C. 548 (Rape)

United States of America
District of Arizona—ss.

Comes now the defendant, in the above-entitled and numbered cause, by his attorneys, and respectfully moves the court for an order setting aside the verdict and quashing the indictment upon the ground and for the reason:

That a conviction on an indictment which fails to charge a crime, is wholly void, and that any judgment which the court might render upon said verdict, or any sentence which the court might impose upon the defendant as a result thereof, would be void and unenforceable:

Tennessee vs. Davis, 100 U.S., 257, 25 L. ed., 648;

United States vs. Hudson, 7 Cranch 32, 3 L. ed. 259;

United States vs. Rothstein (C.C.A.) 187 Federal, 269;

Joseph Mossew vs. United States, 266 Fed., 18, 11 A.L.R. 1261.

Respectfully submitted,
JOHN W. CORDIN
J. B. SUMTER
Attorneys for Defendant.

Counsel respectfully requests that the foregoing motion be heard orally.

[Endorsed]: Copy Received this 24th day of June, 1944. By F. E. Flynn, United States Attorney.

[Endorsed]: Filed Jun. 24, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By: Catherine A. Dougherty, Deputy Clerk. [7]

In the United States District Court
for the District of Arizona

April 1944 Term. Wednesday, June 21, 1944

At Phoenix
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

[Title of Cause.]

C-6759

This case comes on regularly for trial this day. John R. Franks, Esquire, and E. R. Thurman, Esquire, Assistant United States Attorneys are present on behalf of the Government. The defendant is present in person with his counsel John H. Corbin, Esquire, and J. B. Sumter, Esquire. On motion of John H. Corbin, Esquire, It is ordered that J. B. Sumter be entered of record as associate counsel for the defendant. Both sides announce ready

for trial. A lawful jury of twelve men is now duly empaneled and sworn to try this case. E. R. Thurman, Esquire, Assistant United States Attorney, now reads aloud the Indictment to the Jury and thereafter said counsel for the Government states to the jury the defendant's plea of not guilty. The said Assistant United States Attorney now states the Government's case to the Jury. Thereupon, it is ordered that all jurors not empaneled in the trial of this case and in attendance on this court be excused until further order.

Government's Case:

C. H. Gessler is now sworn and examined on behalf of the Government.

Geraldine Rose Ameelyenah is now sworn and examined on behalf of the Government.

Robert L. Currie is now sworn and examined on behalf of the Government.

Sheraton Sharpe is now sworn and examined on behalf of the Government. [8]

The Government Rests.

Thereupon, at the hour of 11:35 o'clock a.m., It is ordered that the jury herein be and it is excused to 2:00 o'clock p.m. this date. The jury is admonished and excluded from the courtroom.

Whereupon, the Defendant now moves for a directed verdict of acquittal for the reason that the evidence shows no offense committed against the Government in that the evidence shows that the complaining witness is over the age of sixteen years.

Thereupon, it is ordered that the further trial of

this case be continued to the hour of two o'clock p.m. this date.

Subsequently, at the hour of two o'clock p.m. the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

It Is Ordered that the defendant's motion for a directed verdict of acquittal be and it is denied.

Defendant's Case.

Mrs. Carl Williams is now sworn and examined on behalf of the defendant.

Carl B. Williams is now sworn and examined in his own behalf.

Government's Exhibit one, letter, is now admitted in evidence.

Lucille Torr is now sworn and examined on behalf of the defendant.

Geraldine Rose Ameelyenah is now recalled and further examined on behalf of the defendant.

The Defendant Rests.

Both Sides Rest.

All the evidence being in, the case is now argued by respective counsel to the Jury.

And thereupon, at the hour of 3:45 o'clock p.m., It is ordered that the further trial of this case be continued to the hour of ten o'clock a.m. June 22, 1944, to which time the Jury [9] being first duly admonished by the Court, the defendant and counsel are excused.

[Title of Court and Cause.]

Thursday, June 22, 1944

Honorable Dave W. Ling, United States District Judge, Presiding

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

The jury is duly admonished by the Court and excluded from the Courtroom. The defendant now moves the Court for an order quashing the Indictment herein upon the grounds that the Court lacks jurisdiction of the offense charged in the indictment and that the indictment does not state facts sufficient to constitute an offense. It is ordered that said motion be and it is denied. The jury, and all members thereof, return into Court, and the Court duly instructs the jury and said jury retire at the hour of 10:20 o'clock a.m. to consider of their verdict.

Subsequently, the defendant and all counsel being present, it is ordered that Government's Exhibit one, letter, be delivered to the Jury.

Thereafter, the defendant and all counsel being present, the jury return in a body into open Court at the hour of 11:45 o'clock a.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

C-6759-Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

Against

CARL B. WILLIAMS,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Carl B. Williams, Guilty in the manner and form as charged in the Indictment.

W. H. SCHEUMACK,
Foreman [19]

The verdict is read as recorded and on motion of John H. Corbin, Esquire, counsel for the defendant; it is ordered that said jury be polled. Thereupon, each juror is called by name and asked if this is his verdict and each of said jurors answers in the affirmative. Whereupon, the Jury is discharged from the further consideration of this case and until further order of the Court and the defendant is remanded to the custody of the United States Marshal to await sentence.

It is Ordered that this case be and it is set for sentence June 26, 1944, at the hour of ten o'clock a.m.

Defendant now moves for an order to permit defendant to continue on his present bond until sentence is imposed, and it is ordered that said motion be and it is denied.

[Title of Court and Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

Monday, June 26, 1944.

This case comes on regularly for judgment and sentence this date. The defendant is present in person with his counsel J. B. Sumter, Esquire. John R. Franks, Assistant United States Attorney, and E. R. Thurman, Assistant United States Attorney, are present on behalf of the United States. Motion of the defendant to set aside the verdict and quash the indictment is now duly argued by respective counsel to the Court, submitted and by the Court taken under advisement. Thereupon, it is ordered that this case be and it is continued for sentence to Tuesday, June 27, 1944, at the hour of ten o'clock a. m.

[Title of Court and Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

Tuesday, June 27, 1944.

This case comes on regularly for judgment and sentence this date. The defendant is present in person with his counsel John H. Corbin, Esquire. John R. Franks, Esquire, Assistant United States Attorney is present on behalf of the Government.

[11]

Thereupon, it is ordered that the defendant's motion to set aside verdict and quash indictment be and it is denied.

Whereupon, no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows: [12]

In the United States District Court
for the District of Arizona

No. C-6759-Phoenix

UNITED STATES OF AMERICA

Plaintiff,

vs.

CARL B. WILLIAMS,

Defendant.

JUDGMENT

Due proceedings having been had on the Indictment filed herein presented against the defendant above named charging a violation of Title 18, United States Code, Section 548.

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of five (5) years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer

and that the same shall serve as the commitment herein.

Dated at Phoenix, Arizona, June 27, 1944.

DAVE W. LING,
Judge.

[Endorsed]: Filed June 27, 1944. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant is: Carl B. Williams, Route 1, Box 669 A, Glendale, Arizona.

Names and addresses of attorneys for appellant are: John W. Corbin, 315 Phoenix National Bank Building, J. B. Sumter, Luhrs Tower, Phoenix, Arizona.

The offense alleged in the indictment is the violation of:

Sec. 289, 35 Stat. 1145, Title 18, U. S. C. A. 468, Sup. and Sec. 43-4901, Par. 2, Arizona Code Ann. 1939.

The sentence imposed by the Court is "the defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States, or his duly authorized representative, for imprisonment in such place of confinement as the said Attorney General shall designate for a period of five (5) years."

I, Carl B. Williams, the above named appellant, appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the conviction, judgment and sentence above set forth and referred to, on the grounds set forth below.

CARL B. WILLIAMS,
Defendant.
JOHN W. CORBIN,
J. B. SUMTER,
Attorneys for Defendant. [14]

---

1. That the Court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the Government's case upon the grounds and for the reason:

(a) That the uncontradicted evidence conclusively shows that the prosecuting witness was over the age of sixteen (16) years, and, therefore, capable of consenting to an act of sexual intercourse with a non-Indian upon lands within the exclusive jurisdiction of the United States.

(b) That Sec. 289, 35 Stat. 1145, Title 18, U. S. C. A., 468, Sup. and Sec. 43-4901, Par. 2. Arizona Code Ann. 1939, does not apply where an act of sexual intercourse has been performed between a non-Indian and a female Indian over the age of sixteen (16) years and under the age of eighteen (18) years upon Indian reservations because Sec. 279, 35 Stat. 1143, Title 18, U. S. C. A. Sec. 458, Sup. is a limitation upon Sec. 289, 35 Stat. 1145, Title

18, U. S. C. A. 468, Sup. and Sec. 43-4901, Par. 2. Arizona Code Ann. 1939.

2. The Court erred in refusing to grant the defendant's motion to set aside the verdict and quash the indictment upon the grounds and for the reason:

(a) That there is no Federal Statute denouncing as a crime an act of sexual intercourse committed upon an Indian Reservation by a non-Indian upon the person of a female Indian over the age of sixteen (16) years and under the age of eighteen (18) years, and that, therefore, said indictment did not state a public offense and that the conviction, judgment and sentence are void.

JOHN W. CORBIN
J. B. SUMTER
Attorneys for Appellant.

Received 2 copies of the within and foregoing Notice of Appeal this 29th day of June, 1944.

F. E. FLYNN
United States Attorney
By: E. R. THURMAN
Assistant United States Attorney

[Endorsed]: Filed Jun. 29, 1944. [15]

[Title of District Court and Cause.]

C-6759

Violation: 18 U.S.C. 548 (Rape)

BOND

Know All Men By These Presents:

That we, Carl B. Williams, as principal, and United States Fidelity and Guaranty Company, as surety, are held firmly and bound unto the United States of America in the full and just sum of Two Thousand Seven Hundred Fifty ($2.750.00) Dollars to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 28th day of June, in the year of our Lord One Thousand Nine Hundred and Forty Four.

Whereas, lately in the April term A. D. 1944 of the District Court of the United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff, and Carl B. Williams as defendant, a judgment and sentence was rendered against the said Carl B. Williams, and the said Carl B. Williams has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and notice of the said appeal, in duplicate, having been filed with the Clerk of the District Court of the United States for the District of Arizona and a copy of such appeal having been duly served upon the

United States Attorney for the District of Arizona, in the manner and within the time required by law and the rules of Court in such cases made and provided.

Now, the condition of the above obligation is such that if the said Carl B. Williams shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California, on such day or days as may be appointed for the hearing of said cause in said court, and upon such day or days as may be appointed by said Court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence of said District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then above obligation shall be void, otherwise to remain in full force and effect.

[16]

Now, therefore, and as a further condition of this bond, that if the said Carl B. Williams, appellant above named, shall prosecute his appeal to the effect and shall pay all the taxable costs on appeal if he fails to make his appeal good, then above obligation shall be void, otherwise to remain in full force and effect.

And the surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond, the United States District Court for

the District of Arizona may upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount of taxable costs in the Circuit Court of Appeals which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and to order execution therefor.

In witness whereof the undersigned have executed this bond this 28th day of June, 1944.

CARL B. WILLIAMS,
Principal.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY,

By O. D. BRICK,
Attorney in Fact,

HILKA DE FRANCE,

O. D. BRICK,
Surety.

State of California,
County of Los Angeles—ss

On this 28th day of June, in the year 1944, before me, Agnes L. Whyte, a Notary Public in and for said County and State, personally appeared O. D. Brick, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and his

own name as Attorney-in-fact.

[Seal] AGNES L. WHYTE,
Notary Public in and for said
County and State.

My Commission Expires Feb. 26, 1945.

Approved this 28th day of June, 1944.

DAVE W. LING,
Judge.

[Endorsed]: Filed June 29, 1944. [17]

[Title of Court and Cause.]

Honorable Albert M. Sames, United States District Judge, Presiding.

Wednesday, July 12, 1944.

John R. Franks, Esquire, Assistant United States Attorney is present on behalf of the Government. John Francis Connor, Esquire, is present on behalf of the defendant and now presents motion of John W. Corbin to withdraw as counsel for the Defendant. Thereupon, it is ordered that said motion be and it is granted and the following order entered:

ORDER

Upon Motion of John W. Corbin, chief counsel of record for the defendant herein, It Is Hereby Ordered, that the said John W. Corbin and the said J. B. Sumter be permitted to withdraw as

attorneys of record for the defendant in the above entitled action.

ALBERT M. SAMES,
Judge.

Thereupon, John Francis Connor, Esquire, now presents motion to substitute Messrs. Dougherty, Chandler and Connor as attorneys for the defendant herein, and it is ordered that said motion be and it is granted and that Messrs. Dougherty, Chandler and Connor be entered as counsel for the defendant herein. [18]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO MAKE RECORD ON APPEAL

Comes now, John F. Connor, of counsel for the defendant-appellant above named, and respectfully moves the Court for an extension of time in which to make his Record on Appeal and submit Assignments of Error; said Motion being supported by the following facts:

That after Notice of Appeal was filed in this action, circumstances warranted the employment of substitute counsel by defendant-appellant; that upon Order of this Court, substitution of counsel of record was duly made;

That new counsel of record is not and could not have been familiar with the proceedings had during the trial of the within action and that informal review of such proceedings is necessary to be had;

that it will be necessary to rearrange affiant's schedule of work incident to his practice and trial of actions in other Courts so as to properly prepare this Appeal; that in order that time may be had to accomplish such objectives, counsel respectfully requests such extension of time.

JOHN F. CONNOR.

Subscribed and sworn to before me this 24th day of July, A. D., 1944.

[Seal] ANN STEINBERG,
Notary Public.

My Commission Expires April 9, 1948.

No Objections:

FRANK E. FLYNN,
U. S. District Attorney for Arizona.

By: JOHN R. FRANKS,
Assistant U. S. District Attorney.

[Endorsed]: Filed July 25, 1944. [19]

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH TO MAKE RECORD ON APPEAL AND SUBMIT ASSIGNMENTS OF ERROR

Upon reading and filing the affidavit of John F. Connor, Esquire, filed herein this day, and due deliberation having been had, it is:

Ordered, that defendant's time to prepare his

Record on Appeal and file his Assignments of Error herein, be extended Thirty (30) days from and after this date.

Dated July 25, 1944.

ALBERT M. SAMES,

United States District Judge, in absence from the District of United States District Judge, Dave W. Ling.

[Endorsed]: Filed July 25, 1944. [20]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be It Remembered that the above entitled and numbered cause came on regularly for trial before the District Court of the United States for the District of Arizona, Phoenix Division, the Honorable Dave W. Ling presiding with a jury, commencing at the hour of 10:00 o'clock A. M. on June 21, 1944, and continuing thereafter until June 22, 1944, when the cause was submitted to the jury and the jury on said day returned their verdict into open court, finding the defendant guilty in manner and form as charged in the indictment.

At the trial of said cause, the plaintiff, United States of America, was represented by Honorable E. R. Thurman and John R. Franks, Deputy United States Attorneys for the District of Arizona; the defendant appeared in person, being represented by his attorneys, John H. Corbin and J. Bolivar

Sumter. Both sides having announced ready for trial, Louis L. Billar was sworn as shorthand reporter; and the jury having been duly summoned into the jury box and sworn to try the cause, the following proceedings were had:

The indictment in said cause was read to the jury, and defendant's plea thereto of not guilty was stated, whereupon the United States of America, plaintiff, to sustain the allegations of said indictment, called C. H. Gensler, Superintendent [21] of the Colorado Indian Reservation, as a witness on behalf of plaintiff and said witness being sworn, testified as follows:

Direct Examination

My Name is C. H. Gensler. I am the superintendent of the Colorado Indian Reservation, lying within the State and District of Arizona. I have lived on and have been associated as an official with the Colorado Indian Reservation for the past twenty-two (22) years or more. I know Geraldine Rose Ameelyenah, the prosecuting witness. I recall that she was born on the Colorado Indian Reservation, and I know that her birth occurred on said reservation on the 8th day of August, 1927. She would have been sixteen (16) years of age on August 8, 1943, and in the first week of December, 1943, she would have been over sixteen (16) years of age and under eighteen (18) years of age. I know the defendant, Carl Williams. He first appeared around Parker and on the Colorado Indian Reservation about two (2) years ago, being first

connected with the War Relocation Authority there, and later securing work as a clerk in the Valley Grocery Store. He became interested in work with the Indians and did missionary work as a Nazarene preacher.

The defendant then waived cross-examination of the witness, Gensler.

GERALDINE ROSE AMEELYENAH

was then called as a witness on behalf of plaintiff, and being duly sworn, testified as follows:

My name is Geraldine Rose Ameelyenah. I am a Mohave Indian, and I live on the Colorado Indian Reservation which is near Parker, Arizona. I know Mr. Carl Williams, the defendant here, and I know his wife who is sitting there at [22] the table to his right. I go to school at the Colorado Indian Reservation. I have lived on this reservation all my life. I am now over sixteen (16) years of age. I was sixteen (16) on the 8th day of August, 1943. I have known Mr. Williams for about a year. He was interested in Indians and Indian work, and he established a Nazarene Church on the reservation and asked my mother if I might be permitted to attend his church with other Indians. After the church was well established, we began publishing a church newspaper, and I was Mr. Williams' assistant on the newspaper. I remember on Friday, December 3, 1943, that Mr. Williams came by my

(Testimony of Geraldine Rose Ameelyenah.)

house in the evening and asked my mother to let me go to the church to do some work on the newspaper. An Indian boy, Laurentine McCormick was with him in his pickup truck. I went with Mr. Williams and then we drove down the road and got another Indian boy, Sheridan Sharp. We went to the church and did some work on the newspaper; fixed up some little articles and then later, when it was getting dark, it was time to go home. We all got in Mr. Williams' pickup truck; Mr. Williams took the boys home first and made one stop to let one boy off at his home and another stop to let the other boy off. Then Mr. Williams and I took a ride. We went down the main highway for awhile and then we drove off the main highway and down a side road about a mile and a half nearby the old Gonzales place. It was about 10 o'clock at night. We stayed there a long time and talked together. When we were there, we got into the back of the pickup truck and Mr. Williams had sexual intercourse with me. After that, he took me to my home. I am not the wife of the defendant. [23]

Cross Examination

The Gonzales place is on the Indian Reservation. We drove out there to talk. We stayed there for a long time. It was out there in the truck where Mr. Williams had intercourse with me. I know I am sixteen (16) because I have always known my birthday, and I have known for a long time that I was born in the year 1927.

SHERIDAN SHARP

was then called as a witness on behalf of plaintiff, and being duly sworn, testified as follows:

My name is Sheridan Sharp. We were at the church, as Geraldine said, and then Mr. Williams took us away, leaving Laurentine at his home and later left me off his car at my home. I last saw Geraldine riding away in the pickup with Mr. Williams.

The defendant then waived cross examination of the witness, Sheridan Sharp. Thereupon the plaintiff announced that it had submitted all its evidence and the plaintiff then rested.

Thereupon the defendant moved for a directed verdict of "not guilty"; said motion was denied by the Court, the defendant duly excepting thereto.

Thereupon the defendant entered upon the presentation of evidence in support of his plea of "not guilty."

CARL B. WILLIAMS

was then called as a witness in his own behalf, and being duly sworn, testified:

My name is Carl B. Williams. I am a married man and have one child, Brian Williams, by name, who is thirteen (13) years old. I was born March 29, 1898, at Lehi, Iowa. I have [24] held various occupations; have done machine work, and worked as a grocery man. Too, I am a minister of the Naz-

(Testimony of Carl B. Williams.)

arene Church. I lived at Parker, Arizona, since about 1942. I know Geraldine Rose Ameelyenah. I am not an Indian. I have no Indian blood. I was born of Caucasian American parentage. I have been interested in spreading the gospel among the Indians and have endeavored to understand their needs and wants. I did not have sexual intercourse with Geraldine on the Colorado Indian Reservation near Gonzales, nor at any other place. I have never had sexual intercourse with her at any place or at any time. On the date upon which I am accused of the offense, I was at my own home, busily engaged in preparing notes for a sermon which was to be given at the church on the following Sunday.

Cross Examination

I did not know Geraldine's age. I wasn't interested in her age, whether she was sixteen (16) or eighteen (18), or otherwise. I was only interested in the spiritual welfare of the Indians and had no intimate relations with her or any other Indian at any time or any place.

Thereupon the defendant put on other evidence which is not material to the issues presented on the Record on Appeal.

Upon the conclusion of his case, defendant again moved for a directed verdict upon the ground that no competent evidence had been adduced to show the commission of any crime by the defendant, and said motion being by the Court denied, the defendant thereto duly excepted.

Thereafter, the trial was recessed until 10 o'clock A. M., the following day. [25]

After recess taken, and on June 22, 1944, further proceedings were had, and defendant moved the Court for an order quashing the indictment on the grounds that the indictment did not state facts sufficient to constitute a public offense, and further that the Court lacked jurisdiction of the offense charged in the indictment. The motion was denied by Order of Court, the defendant duly excepting thereto, whereupon the jury was instructed and at the hour of 10:20 A. M., retired to consider the verdict and at 11:45 A. M. on said day, returned their verdict of "guilty".

Thereafter, and upon June 26, the defendant came on regularly for sentence, whereupon defendant by his attorneys, filed and presented his formal written motion to set aside the verdict and quash the indictment on the grounds that the indictment did not state facts sufficient to constitute a public offense, and for the further ground that the Court lacked jurisdiction of the offense charged in the indictment. Said motion being duly argued by respective counsel, the same was submitted to the Court and by it, taken under advisement, until June 27, 1944, at 10 o'clock A. M., at which time defendant appeared by his attorneys aforesaid and the Court entered its order denying defendant's motion to set aside the verdict and quash the indictment, to which order the defendant excepted. Thereupon judgment was duly imposed and there-

after upon motion duly made, bail bond was fixed.

The defendant presents the foregoing as his Proposed Bill of Exceptions in the above entitled and numbered cause and prays that same may be settled and allowed. [26]

Dated this 14th day of August, A. D., 1944.

DOUGHERTY, CHANDLER & CONNOR

By JOHN F. CONNOR
Attorneys for Defendant
516-19 Heard Building
Phoenix, Arizona

It is stipulated that the foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated this 14 day of August, A. D., 1944.

F. E. FLYNN,
United States Attorney for the District of Arizona

By E. R. THURMAN
Assistant United States Attorney

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved, within the period of extended time heretofore granted by Order of Court.

Dated this 15 day of August, A. D., 1944.

ALBERT M. SAMES

United States District Judge, in absence from the District of United States District Judge, Dave W. Ling.

Received copy of Proposed Bill of Exceptions this 14th day of August, A. D., 1944.

E. R. THURMAN

Assistant United States Attorney

[Endorsed]: Filed Aug. 24, 1944. [27]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Carl B. Williams, the defendant-appellant in the above entitled and numbered Cause, in connection with his Appeal herein, comes now and makes it known that, in the records, proceedings, verdict, judgment, and sentence appealed from, manifest error has intervened to his prejudice, in these particulars, to-wit:

I.

The Court erred in overruling defendant's Motion to Quash the Indictment for the reason that the Indictment was defective in substance and adversely affected defendant's rights to liberty.

II.

The Court erred in its refusal to grant defendant's Motion for Directed Verdict for the reason that there was no competent evidence adduced upon his trial to show the guilt of the defendant.

III.

The Court erred in admitting any evidence relative to the commission of an alleged offense by the defendant for the reason that the act as alleged was not a violation of any criminal statute of the United States, nor of the statute [28] under which he was indicted for the reason that the uncontradicted evidence conclusively shows that the prosecuting witness was over the age of sixteen (16) years, and therefore, capable of consenting to an act of sexual intercourse with a male person upon lands within the exclusive jurisdiction of the United States.

IV.

The Court committed error in refusing to grant defendant's Motion to Set Aside the Verdict for the reason that he was deprived of his liberty without due process of law in that there is no Federal Statute denouncing as a crime an act of sexual intercourse with a female person over the age of sixteen (16) years, without force and with her consent.

V.

The Court erred in holding as a matter of law that the defendant, under the facts and circumstances of the case, was guilty of the crime of rape,

for the reason that no Federal statute defines as a crime the action with which defendant was charged.

DOUGHERTY, CHANDLER & CONNOR

By JOHN F. CONNOR,

Attorneys for Defendant-Appellant

516-519 Heard Building

Phoenix, Arizona

Received copy of the within Assignments of Error this 24 day of August, A. D., 1944.

FRANK E. FLYNN,

United States Attorney

By E. R. THURMAN

Assistant United States Attorney

[Endorsed]: Filed Aug. 24, 1944. [29]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF RECORD ON APPEAL

The appellant, Carl B. Williams, adopts the Assignments of Error filed in the District Court, as the points on which he intends to rely in this Appeal, and designates the printing of the transcript of record in accordance with defendant-appellant's Praecipe for Record on Appeal, as prepared and sent up by the Clerk of the District Court.

Dated, at Phoenix, Arizona, this 24th day of August, 1944.

DOUGHERTY, CHANDLER & CONNOR

By JOHN F. CONNOR

Received copy of this document, this 24th day of August, A. D., 1944.

F. E. FLYNN,
United States Attorney

By E. R. THURMAN
Assistant United States Attorney

[Endorsed]: Filed Aug. 24, 1944. [30]

[Title of District Court and Cause.]

PRAECIPE OF DEFENDANT FOR RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Arizona:

The defendant-appellant, Carl B. Williams, hereby requests that you make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to his Appeal taken in the above entitled Cause, and to include in such transcript of record, the following:

1. Indictment.
2. Verdict of Jury.

3. Judgment and Sentence entered June 27, 1944.
4. Notice of Appeal.
5. Bond on Appeal.
6. Bill of Exceptions.
7. Assignment of Errors.
8. The following minute entries:

Minute entry of April 4, 1944, pertaining to the arraignment.

June 21, 1944.

June 22, 1944, denying defendant's motion for order quashing indictment. [31]

June 24, 1944, pertaining to defendant's written motion to set aside verdict and quash indictment.

June 27, 1944, denying defendant's motion to set aside verdict and quash indictment.

July 12, 1944, pertaining to former Counsel's withdrawal and order to substitute Dougherty, Chandler & Connor as Counsel of record.

July 25, 1944, pertaining to extension of time to file Bill of Exceptions.

9. This Praecipe.

Dated, at Phoenix, Arizona, this 24th day of August, 1944.

DOUGHERTY, CHANDLER & CONNOR

By JOHN F. CONNOR

Attorneys for Defendant-Appellant

Received copy of the within Praecipe this 24th day of August, 1944.

F. E. FLYNN,
United States Attorney
By E. R. THURMAN
Assistant United States
Attorney

[Endorsed]: Filed Aug. 24, 1944. [32]

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Carl B. Williams, Defendant, numbered C-6759-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 32, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made

a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $10.05, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of the said Court this 1st day of September, 1944.

[Seal] EDWARD W. SCRUGGS,
Clerk.
By CATHERINE A. DOUGHERTY
Chief Deputy Clerk. [33]

[Endorsed]: No. 10825. United States Circuit Court of Appeals for the Ninth Circuit. Carl B. Williams, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 5, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10825

CARL B. WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ADOPTION OF STATEMENT OF POINTS IN CERTIFIED TRANSCRIPT AS STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

The Appellant, Carl B. Williams, hereby adopts the Statement of Points appearing in the transcript of the Record, as the Statement of Points on which Appellant intends to rely on appeal, and said Appellant further designates the printing of the transcript of record in its entirety as certified to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, at Phoenix, Arizona, this 12th day of September, A. D., 1944.

DOUGHERTY, CHANDLER & CONNOR

By JOHN F. CONNOR

Received copy of this document, this 12th day of September, A. D., 1944.

F. E. FLYNN,
United States Attorney

By .....,
Assistant United States Attorney

[Endorsed]: Filed Sep. 14, 1944. Paul P. O'Brien, Clerk.

No. 10825

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARL B. WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, February 1, 1945.

Before: Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. John Francis Connor, counsel for appellant, and by Mr. E. R. Thurman, Assistant United States Attorney, counsel for appellee, and submitted on oral stipulation of said counsel, to Mathews, Healy and Bone, Circuit Judges.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, March 30, 1945.

Before: Mathews, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith

filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeal from the District Court of the United States for the District of Arizona

Before: Mathews, Healy and Bone, Circuit Judges.

Mathews, Circuit Judge.

OPINION AND DISSENTING OPINION

The questions here presented are (1) whether the indictment under which appellant was convicted and sentenced charges an offense against the United States and (2) whether the evidence supports the conviction.

First. The indictment charges that appellant, on or about December 10, 1943, within the District of Arizona and within and upon the Colorado River Indian Reservation, did "wilfully, unlawfully and feloniously ravish and carnally know Geraldine Rose Ameelyenah, she, the said Geraldine Rose Ameelyenah, being then and there a female person and an Indian under the age of eighteen years, and not being then and there the wife of [appellant]."

On the margin of the indictment this endorsement appears: "Violation: 18 U.S.C. 548 (Rape)." The endorsement indicates that the District Attorney who drew the indictment thought he was charging an offense under § 328 of the Criminal

Code, 18 U.S.C. § 548. This section applies only to offenses committed by Indians. The indictment does not charge that appellant is an Indian.[1] It therefore does not charge an offense under this section. However, as the Supreme Court has said:

"It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. The endorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."[2]

The United States does not here contend that the indictment charges an offense under § 328 of the Criminal Code, 18 U.S.C.A. § 548, but contends that it charges an offense under § 2145 of the Revised Statutes, 25 U.S.C.A. § 217, and § 289 of the Criminal Code, 18 U.S.C.A. § 468.

Section 2145 of the Revised Statutes, 25 U.S.C.A. § 217, provides that, with inapplicable exceptions, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the

[1] The evidence shows that appellant is a white man.

[2] Williams v. United States, 168 U.S. 382, 389. See, also United States v. Nixon, 235 U.S. 231.

United States * * * shall extend to the Indian country." As used in this section, the term "Indian country" includes Indian reservations.[3]

The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States are found in chapter 11 [(§ 272-289) of the Criminal Code, 18 U.S.C.A. §§ 451-468. Places within the sole and exclusive jurisdiction of the United States are described in § 272 of the Criminal Code, 18 U.S.C.A. § 451. When committed in such places, certain acts are made penal by §§ 273-288 of the Criminal Code, 18 U.S.C.A. §§ 452-467, but the act charged in the indictment in this case is not one of these. Section 289 of the Criminal Code, 18 U.S.C.A. § 468, provides:

"Whoever, within the territorial limits of any State, * * * but within or upon any of the places now existing or hereafter reserved or acquired, described in [§ 272 of the Criminal Code, 18 U.S.C.A. § 451],[4] shall do * * * any act or thing which is not made penal by any laws of Congress, but which if committed * * * within the jurisdiction of the State * * * in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of doing * * * of such act or thing, would be penal, shall be deemed guilty

[3] In re Wilson, 140 U.S. 575; Pickett v. United States, 216 U.S. 456; Donnelly v. United States, 228 U.S. 243; United States v. Ramsey, 271 U.S. 467.

[4] As shown above, these provisions apply, not only to the places described in § 272 of the Criminal Code, 18 U.S.C.A. § 451, but also to Indian reservations.

of a like offense and be subject to like punishment."

The indictment in this case charges an act of carnal knowledge (sexual intercourse) accomplished with a female, not the wife of the perpetrator, under the age of eighteen years. It charges that the act was committed within the territorial limits of the State of Arizona,[5] but within and upon an Indian reservation, on or about December 10, 1943. The act so charged was not made penal by any laws of Congress. If, however, the act had been committed within the jurisdiction of the State of Arizona, it would have been penal by a law of the State (§ 43-901 of the Arizona Code) in force on February 1, 1940, and remaining in force on December 10, 1943. Section 43-901 provides, and did at all pertinent times provide:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, in any of the following circumstances: Where the female is under the age of eighteen (18) years. * * *. Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five (5)."

Thus the indictment charges an act which, if committed within the jurisdiction of the State, would have constituted an offense against the State —the offense which § 43-901 defines as "rape." It therefore charges a like offense against the United States.

Appellant contends that § 289 of the Criminal

[5] The State of Arizona and the District of Arizona have the same territorial limits. 28 U.S.C.A. § 143.

Code, 18 U.S.C.A. § 468, is inapplicable here and, in support of his contention, cites §§ 278 and 279 of the Criminal Code, 18 U.S.C.A. §§ 457 and 458.

Section 278 of the Criminal Code, 18 U.S.C.A. § 457, provides: "Whoever shall commit the crime of rape shall suffer death." As used in this section, the term "rape" means rape as defined at common law.[6] The indictment in this case does not charge the common-law offense. Instead, it charges a statutory offense like that which § 43-901 of the Arizona Code defines as rape.

Section 279 of the Criminal Code, 18 U.S.C.A. § 458, provides: "Whoever shall carnally and unlawfully know any female under the age of sixteen years * * * shall, for the first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years." This section applies only to acts of unlawful carnal knowledge (sexual intercourse) accomplished with females under the age of sixteen years. The indictment in this case does not charge such an act. Instead, it charges an act of unlawful carnal knowledge accomplished with a female under the age of eighteen years.[7]

We conclude that § 289 of the Criminal Code, 18 U.S.C.A. § 468, is applicable here, and that §§ 278 and 279 of the Criminal Code, 18 U.S.C.A. §§ 457 and 458, are inapplicable.

Second. There is evidence to the following ef-

[6] Oliver v. United States, 9 Cir., 230 F. 971.

[7] The evidence shows that Geraldine Rose Ameelyenah was over the age of sixteen years and under the age of eighteen years.

fect: Appellant is a white man. Geraldine Rose Ameelyenah is a female Indian. On December 3, 1943, appellant had sexual intercourse with Geraldine Rose Ameelyenah at a place within the District of Arizona and within and upon the Colorado River Indian Reservation. At that time, Geraldine Rose Ameelyenah was over the age of sixteen years, was under the age of eighteen years, and was not appellant's wife. The evidence amply supports the conviction.

Judgment affirmed.

Healy, Circuit Judge, dissenting

The act proved here was the having of sexual intercourse with an Indian girl over the age of sixteen, with the girl's consent. By §279 of the Criminal Code, 18 USCA §458, Congress has undertaken to define and punish the crime commonly termed "statutory rape," that is, the act of having carnal knowledge of a female of tender years. It has fixed at sixteen years the age below which consent to the act may not lawfully be given.

The statute exhibits a congressional policy intended to obtain in all places over which the federal jurisdiction extends, regardless of what the local policy may be—whether less or more stringent. Thus if, as in the case in a number of states, the local statute has fixed the age of consent at a less mature age than sixteen, still, as the government admits, the federal statute governs in those localities within the state where the federal jurisdiction obtains. The converse, I think, is equally true. Accordingly, in my opinion, §289 of the Criminal Code, 18 USCA §468, is inapplicable. That statute

was intended to apply only in the case of those offenses concerning which Congress has not itself deemed it politic to legislate.

No crime was charged or proven under the federal statute and I think the judgment of conviction should be reversed.

[Endorsed]: Opinion and Dissenting Opinion. Filed Mar. 30, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10825

CARL B. WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the District of Arizona.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered March 30, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday May 14, 1945.

Before: Mathews, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING, ETC.

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed May 1, 1945, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

Upon consideration of the motion for stay of mandate in the event such petition for rehearing be denied, It Is Further Ordered that the issuance of the mandate of this Court in above cause be, and hereby is stayed to and including June 16, 1945, and if within said time the appellant shall file with the clerk of the Supreme Court of the United States his petition for a writ of certiorari, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-eight (48) pages numbered from and including 1 to and including 48, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of May, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

No. 1365

JUN 11 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CARL B. WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

M. J. DOUGHERTY,
516-19 Heard Bldg.,
Phoenix, Arizona
Counsel for Petitioner

JOHN F. CONNOR,
516-19 Heard Bldg.,
Phoenix, Arizona
Of Counsel for Petitioner

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CARL B. WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF

M. J. DOUGHERTY,
516-19 Heard Bldg.,
Phoenix, Arizona
Counsel for Petitioner

JOHN F. CONNOR,
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Phoenix, Arizona
Of Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CARL B. WILLAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Carl B. Williams, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 30, 1945, and denial of a petition for re-hearing entered May 14th, 1945, respectfully shows:

A
SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding was initiated by an indictment by the United States on March 23, 1944, in the District

Court of the United States, for the District of Arizona, as cause No. C6759. The indictment by its caption charged a violation of 18 U. S. C., S. 548, (Rape), while the tenor of the body of the indictment charged that on or about the 10th day of December, 1943, upon and within the limits of the Colorado River Indian Reservation in the District of Arizona, the defendant did have carnal knowledge of a female Indian under the age of eighteen (18) years, the said female Indian not then and there being the wife of the defendant. (R. 2).

The proceeding came on regularly for trial on June 21, 1944. (R. 6).

The facts developed at the trial, briefly stated, show that petitioner is a member of the Caucasian race; that he has no Indian blood whatsoever; that he is a mechanic and clerical helper; that he is married and has one son about the age of fifteen (15) years; that the defendant first made his appearance around Parker, Arizona, sometime in the spring of 1942, Parker, Arizona, being a village adjacent to the Colorado River Indian Reservation in said District of Arizona.

The evidence disclosed that the defendant, in addition to his usual work, was a missionary of the Nazarene Church, and that in connection therewith, he sought to enlighten the Indians with reference to religious tenets of said church; (R. 27); that during the latter part of 1943, he established a missionary church on the Colorado Indian Reservation near Parker and within the District of Arizona.

Among the Indians, there enters as the principal in the case, one Geraldine Rose Ameelyenah, an Indian girl who had become a disciple of the Church. Sometime after the establishment of the mission, the defendant began printing a church newspaper. It became the province of Geraldine Rose to assist the defendant in his work (R. 24,).

The Government evidence tended to show that on or about the early evening of December 3, 1943, defendant called at the home of Geraldine Rose and had her accompany him, together with two Indian boys, in a "pickup truck" to the missionary church where some work on the newspaper was to be done. (R. 24, 25).

By this government testimony, it appears that sometime after dark, on said evening, the group of four departed from the church, the defendant taking the two Indian boys to their respective homes and later, driving away on a country road with the girl, Geraldine Rose, where eventually, around 10 o'clock in the evening, they stopped near what is described as "the old Gonzales place',' which is admitted to be on the Colorado Indian Reservation.

Near this place, the defendant and the Indian girl in question got into the rear part of the "pickup" and there the defendant is alleged to have had sexual intercourse with Geraldine Rose. Thereafter, the defendant-petitioner took the girl to her home (R. 24, 25).

The Government developed evidence to the effect that Geraldine Rose, at the time of the commission of

the alleged act, was under eighteen (18) years of age, but over the age of sixteen (16) years, (R. 24, 25). This evidence was uncontradicted.

Appellant's plea of "Not Guilty" was founded on evidence to the effect that at the time of the commission of the alleged act, he was at his own home preparing a sermon to be delivered at the church the following Sunday (R. 27).

THE CONVICTION AND SUBSEQUENT PROCEEDINGS

Upon these facts, the defendant was convicted (R. 4) and judgment and sentence were pronounced on June 27, 1944, (R. 12).

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, cause No. 10825. Upon appeal in the Court below, petitioner contended:

(1) That the indictment did not state a crime under the laws of the United States of America, (R. 30, 31) and hence that the District Court was without jurisdiction;

(2) That neither the offense charged nor proved constituted any wrong, crime or violation of Federal Law on the part of the defendant under all the circumstances of the case. (R. 30, 31). These contentions were rejected by the majority opinion of the Appellate Court on March 30, 1945, wherein a dissenting opinion was also filed in the case. (R. 46).

Thereafter, a petition for rehearing was filed in the United States Circuit Court of Appeals for the

Ninth Circuit, and in due time, the same was denied. (R. 48). This petition is filed within thirty days next after denial of petition for rehearing on May 14th, 1945.

B

STATEMENT OF THE JURISDICTION OF THIS COURT

(1) STATUTORY PROVISION BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, S. 1, 43 Stat. 938 [U. S. C., Title 28, S. 347 (a)], and under the same Act, ch. 229, S. 8, 24 Stat. 940 (U. S. C., Title 28, S. 350).

(2) THE DATE OF THE JUDGMENT TO BE REVIEWED.

The judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the conviction of petitioner was entered on the 30th day of March, 1945, (R. 48).

This petition, with supporting brief, and the certified record, are filed within thirty days next after denial of petition for rehearing.

(3 STATEMENT OF THE NATURE OF THE CASE AND THE RULINGS OF THE CIRCUIT COURT OF APPEALS BRINGING THE CASE WITHIN THE JURISDICTION OF THIS COURT.

The nature of the case (a prosecution for the offense of carnal knowledge or rape) has been stated ante. The Circuit Court of Appeals ruled:

(1) That, while S. 458 of Title 18, U. S. C. defined the offense of carnal knowledge as an act of sexual intercourse with a female under the age of sixteen (16) years and although the female in this instance was over the age of sixteen (16) years, that nevertheless, the defendant was guilty of the crime of rape for the reason that the offense was regarded as a crime in view of S. 468, 18, U.S.C. by reason of the fact that S. 43-4901, Arizona Code Annotated, 1939, defined the act as being that of rape, in that the female in question was under the age of eighteen (18) years; and hence, that the defendant was punishable under the indictment;

(2) That the indictment properly stated an offense and that the trial court was vested with jurisdiction (R. 45-46;

(3) in effect, that S. 458, U. S. C. does not in any manner limit S. 468, 18, U. S. C. (R. 41-45).

Each of such rulings is reviewable by this Court under the appropriate statutory provisions noted.

(4) CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiotari, and next immediately following this paragraph.

Magnum Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 60 L. Ed. 629

Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. Ed. 340

C

THE QUESTION PRESENTED

(1) Was the indictment under which the petitioner was brought to trial valid and did it state an offense cognizable under the laws of the United States? (R. 2).

(a) Does S. 458, 18, U. S. C. limit the application of S. 468, 18, U. S. C.?

(b) Was the offense charged, one of "rape" or of "carnal knowledge"? (R. 2 and 44).

(2) Did the offense charged and the evidence offered in support thereof constitute an offense by the petitioner within the meaning of either S. 468, 18, U. S. C. or S. 548, 18, U. S. C. (R. 45, 46).

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In ruling (R. 45) that the conduct of petitioner, in carnally knowing on an Indian reservation, Geraldine Rose Ameelyenah, a female Indian, not the wife of petitioner, and under the age of eighteen (18) years, but over the age of sixteen (16) years, constituted the offense of rape within the meaning of S. 468, 18, U. S. C., and S. 43-4901, Arizona Code Anno-

tated, 1939, the Circuit Court of Appeals (Healy, Justice, dissenting) has decided a Federal question in a way probably in conflict with applicable decisions of this Court, e.g. violations of S. 468, 18, U. S. C., viz: *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. Ed. 65, and has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter, e.g.—construction of S. 468, 18, U. S. C., viz: *United States v. Carter*, 84 Fed. 622.

(2) In ruling (R. 45) that S. 468, 18, U. S. C. is applicable in the instant case, the Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, viz: *Ex Parte Hart*. 157 Fed. 130.

(3) In ruling that S. 548, 18, U. S. C. is not applicable in this case because the petitioner is not an Indian, (R. 42), the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court, viz: *Gregorio Chavez* v. *United States*, 290 U. S., 357, 78 L. Ed. 360,

(4) Or, if the ruling below is not in conflict with the foregoing decisions, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, viz: (a) Whether or no an act of sexual intercourse with a female over the age of sixteen (16) years and under the age of eighteen (18) years, at a place over which the United States has exclusive jurisdiction, and when such female is not the wife of the man involved, is a

violation of United States laws? (b) whether S. 458, 18, U. S. C. limits the application of S. 468, 18, U.S.C.?

The ruling below is unmistakably in conflict, at least in principle, with the doctrine of the Ex-parte Hart case as heretofore judicially construed, and contrary to the doctrine enunciated in the Press Publishing Company case; hence, if, contrary to the contention of the petitioner, the ruling below is not in conflict with the cases noted, it presents an important question of Federal law which should be settled by this Court.

CONCLUSION

Each of the facets of the question presented is of grave and public importance. Unless the majority ruling below is reviewed, the law relating to the crime of rape and carnal knowledge, as it concerns those offenses when committed on territory within the exclusive jurisdiction of the United States will be left in doubt and confusion. The question involved presents a matter of fundamental importance, which, in the public interest ought to be resolved.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 10825, criminal, Carl B. Williams, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the sta-

tutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this Court, and your petitioner prays that the certified copy of the record and proceedings of the said United States Circuit Court of Appeals for the Ninth Circuit filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in comformity with law.

CARL B. WILLIAMS,
Petitioner

M. J. DOUGHERTY,
Counsel for Petitioner

JOHN F. CONNOR,
Of Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

CARL B. WILLIAMS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is not officially printed at the time of filing this brief. However, the decision of the Court was declared and announced on March 30, 1945, and is copied in the Transcript of Record. (R. 41-47). The dissenting opinion of Hon. William Healy, Circuit Judge, is found at page 46 of the record.

II.

JURISDICTION

1. The date of the judgment to be reviewed is March 30, 1945, (R. 41-47), and the date of denial of petition for re-hearing is May 14, 1945, (R. 48).

2. The grounds upon which the jurisdiction of this Court is invoked are as follows:

(a) That the majority decision of the Court below is in conflict with applicable decisions of this Court;

(b) That said decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter, e.g. the construction of S. 468, 18, U. S. C.;

(c) That if the ruling below is not in conflict with applicable decisions of this Court and in conflict with decisions of other Circuit Courts of Appeal on the same matter, that the Circuit Court of Appeals has decided an important question of Federal law which has not been, but which should be, settled by this Court. (See "D" of Petition for Certiorari, page 7, made a part hereof.)

3. The statutory provisions under which the jurisdiction of this Court is invoked are: Judicial Code S 240 (a) as amended by the Act of February 13, 1925, 43 Stats., 938.

III.

STATEMENT OF THE CASE

A full statement of the case has been heretofore given in the Petition for Certiorari under heading "A", and in the interest of brevity, the statement is not here repeated (see pages 1 to 5, Petition for Certiorari, made a part hereof.)

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in finding and holding that the indictment under which appellant was convicted and sentenced charges an offense against the United States.

2. The Circuit Court of Appeals erred in finding and holding that the petitioner was guilty of the offense of rape within the meaning of S. 289 of the Criminal Code, 18, U. S. C., S. 468 and 43-4901, Arizona Code Annotated, 1939.

3. The Circuit Court of Appeals erred in finding and holding, in effect, that S. 289 of the Criminal Code, 18, U. S. C., S. 468, is not limited by S. 279 of the Criminal Code, 18, U. S. C., S. 458.

4. The Circuit Court of Appeals erred in finding and holding that section 548, 18, U. S. C. is not applicable solely for the reason that petitioner is not an Indian. *Gregorio Chavez c. United States*, 290 U. S. 357, 78 L. Ed. 360.

SUMMARY OF ARGUMENT

Italics appearing in Argument following are supplied by Counsel, unless otherwise indicated.

I

The decision below is contrary to and in conflict with prior decisions of this Court and with decisions of other Circuit Courts of Appeal on the same matter, for the reason that the indictment and proof, neither charged nor sustained an offense cognizable under Federal statutes. United States v. Press Publishing Company, 219 U. S.

1, 55 L. Ed. 65; Ex Parte Hart, 157 Fed. 130; United States vs. Carter, 84 Ed. 622.

II

Properly construed as to its legal effect, section 458, 18, U. S. C. is a limitation upon both sections 468 and 548, 18, U. S. C. insofar as the offense of carnal knowledge is concerned.

(a) Section 548, 18, U. S. C. was not intended by Congress to re-define carnal knowledge in a manner at variance with section 458, 18, U. S. C.

Point 1

Conflict with prior Supreme Court and Federal decisions.

Section 289 of the Criminal Code, section 468, 18, U. S. C., sometimes called the "Assimilative Crimes Act", provides:

> "Whoever, within the territorial limits of any State, *** but within or upon any of the places now existing or hereafter reserved or acquired, described in (S. 272 of the Criminal Code, 18 U. S. C. A. S. 451), shall do *** any act or thing which is not made penal by any laws of Congress, but which if committed *** within the jurisdiction of the State *** in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing *** of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to like punishment."

Section 279, Criminal Code, section 458, 18, U. S. C., provides:

> "Whoever shall carnally and unlawfully know any female under the age of sixteen years *** shall, for the first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years."

Section 43-4901, Arizona Code, 1939, insofar as it is material to this case, provides:

> "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, in any of the following circumstances: Where the female is under the age of eighteen (18) years. *** Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five (5)".

Section 458, above set out projects the elements which constitute the offense of carnal knowledge. One of the essential elements is the age of the female. Upon this specific element Congress has legislated by virtue of said section. There is nothing in the Assimilative Crimes Act to indicate that Congress intended to eliminate the age element of the offense of carnal knowledge, as prescribed by Congress, and to substitute therefor a new element, viz., a higher age limit under the Statutes of the respective states.

The Assimilative Crimes Act, in essence provides that where any act is not declared penal by Con-

gress, but is declared penal by the law of the state in which the act takes place, that such act will then be regarded as being an offense against the United States.

It is the contention of petitioner that the act with which he is here charged, namely that of unlawful carnal knowledge or sexual intercourse with a female, is specifically provided for by the Congress and that hence the provisions of section 468 do not apply. So far as can be learned by counsel for petitioner, this is a case of first impression, and no applicable precedents with respect to the commission of the offense of carnal knowledge can be found.

However the construction of section 468, 18, U. S. C., is involved, and the legal effect of such section has been passed upon by this Court in a manner which Counsel respectfully suggests is directly in conflict with the tenor of the decision of the Circuit Court of Appeals.

Said this Court in *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. Ed. 65, (at page 67, Col. 1),

> "It is certain on the face of the quoted section, that it exclusively relates to offenses committed on United States Reservations, etc. which are 'not provided for by any law of the United States,' ***** that is so say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by law of the United States, that law is dominant and controlling, ******"

With respect to the construction of said section now under consideration, Counsel likewise respectfully invites the attention of this Court to its decision concerning said section, in *Franklin v. United States*, 216 U. S. 559, 54 L. Ed. 615 where at page 569, Col. 2, the Court held in effect that section 468 provided for the adoption of:

> "The criminal laws then existing in the several states *****, insofar as said laws *were not displaced by specific laws enacted by Congress.*"

Conflict With Other Circuit Courts

Petitioner suggests that the decision below is in direct conflict in principle with the Circuit Court for the Southern District of New York as declared in *United States v. Carter*, 84 Fed. 622.

There defendant Carter had been indicted for murder under sections 5391 (now 468, 18, U. S. C.) and 5339 (now 451-452, 18, U. S. C.). Defendant challenged jurisdiction of the Federal Courts on the grounds that the offense had been committed in the State of New York, said offense having been committed on a fuel ship moored in a dock within the State of New York, but the dock having been ceded by New York to the United States.

The Court held that the United States had jurisdiction of the offense by virtue of the fact that the act was committed within its jurisdiction and because the crime of murder was specifically denounced by the Federal statutes.

It would follow that if there had been no United States law punishing for murder under the circumstances of the case, that section 468, 18, U. S. C. could have been properly invoked, and the law of New York applied within the Federal Courts.

The Conclusion Is Untenable

Counsel for petitioner likewise suggests that the matter of *Ex Parte Hart*, 157 Fed. 130, also decided by the Ninth Circuit is directly in conflict and at variance with the purport of the decision below, and, that hence the Ninth Circuit Court has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

In the Hart case, there was involved the crime of incest committed by an Indian with his daughter, both being Indians.

It was the contention of Government Counsel, among other theories advanced, that the act of July 7, 1898, (substantially similar to now section 468, 18, U. S. C.) could be applied to the facts in the case.

The Court refused to adopt this view, and held, in effect, that inasmuch as the act of incest is not only prohibited by general United States law, but its punishment expressly provided for, the provision of section 468, 18, U. S. C., did not apply. (Page 133 of the Opinion.)

The Court went on further to say:

> "The offense of incest is, therefore, excepted out of this statute, (that is, section 468, title 18)

because as it appears, it is not only defined, but the punishment thereof is prescribed, by a law of Congress." (Page 134 of the Opinion).

Generally, with respect to petitioner's contention that section 468, 18, U. S. C. is to be applied only where the acts complained against are not made penal by any act of Congress, see:

"*People of Puerto Rico v. Shell Company*, 302 U. S. 253, 82 L. Ed. 235;

Johnson v. Yellow Cab Transit Co., 321 U. S. 383, @ 389—391 and cases there cited. 88 L. Ed. 814;

People v. Martin, 47 N. Y. S., 2d, 883."

Point 2.

Section 458, 18, U. S. C. limits both sections 468 and 548, 18, U. S. C. with respect to the offense of carnal knowledge.

Now the precise question involved in this action is whether the act or offense charged is denounced as a crime by Federal Statutes. If it is so denounced, said section 468 does not apply. If it is not in terms denounced, then section 468 does apply.

This leads us to enquire, what is the substantial wording of the indictment?

The indictment (R. 2) states in substance that the petitioner,

" * * did then and there wilfully, unlawfully and feloniously ravish and carnally know Geral-

dine Rose Ameelyenah, * * * * a female person and an Indian * under the age of eighteen (18) years, * "

Section 458, 18, U. S. C. provides

"Whoever shall carnally and unlawfully know any female under the age of sixteen (16) years * * * shall, * * * be imprisoned * * * * * *"

Does not the said section 458, denounce in terms the act of carnal knowledge? How then does section 468 apply?

The Government concedes that the Federal Statutes denounce the offense when committed with a female under sixteen (16) years. It contends, however, that there is no federal law denouncing the offense when committed with a female *over* the age of sixteen (16). Therefore, it is asserted that S. 468, 18, U. S. C. applies.

The Government's Position Effects An Implied Repeal of S. 458, 18, U.S.C.

This kind of reasoning effects an implied repeal of section 458. Either the Congress has declared the offense under consideration as a crime when committed with a female under sixteen (16) and has permitted the allowable inference that when committed with a female *over* sixteen (16), that such female could lawfully give her consent to such act, or that she could not so consent unless the State law in effect where the act took place permitted her to give lawful consent.

The result of the decision below, is that under section 468 herein discussed a female *over* sixteen (16) cannot lawfully give her consent under Federal law. We thus have a conflict between what Congress intended and what the lower Court indicates it ought to have intended.

Congress has declared the essential elements constituting the offense, and, therefore, the State law, as embraced in section 43-4901, Arizona Code, 1939, could, in no event, apply. To attempt to do so would be the result of distortion and illogical extension of the meaning of the Statute and the end result would be legislation by judicial decree.

> "The Statute being penal in its intendment, it is to be strictly construed and not extended by judicial construction beyond what the legislature has written."

United States v. Resnick, 209 U. S. 207, 81 L. Ed. 127.

An implied repeal by judicial construction is to be avoided.

> "It is not within the province of a Court in the course of construction of a statute, to make or supervise legislation."****** "To depart from the meaning expressed by the words of a statute, is to alter it, and is not construction, but legislation."

50 Am. Jur., **Statutes**, S. 228.

> "General rules relating to repeal ** by implication are * applicable to penal statutes ***"

50 Am. Jur., **Statutes**, S. 567.

In summation of this aspect of the argument, petitioner contends that a process of logical reasoning leads but to the conclusion that in the instance here under consideration, the offense is not covered by S. 468, 18, U. S. C. The proper interpretation of said section, by its own terminology excludes its application.

The enumeration of the precise and specific figure of sixteen (16) years of age, contained in S. 458, 18, U. S. C., would seem to carry with it the implication of a purpose to exclude higher ages. Some implication and limitation ought to attach to the construction of section 468, by reason of the fact that Congress enacted section 458 and did not later repeal it. Were the decision of the Lower Court to stand, a repeal would be implicit in the majority conclusion of the Court.

Expressio Unius Est Exclusio Alterius

Here, certainly, it occurs to Counsel, is the proper application for the maxim, Expressio Unius Est Exclusio Alterius.

However, the Government will undoubtedly contend that there is no repeal. But it is on the horns of dilemma. As was pointedly made clear in the dissenting opinion below, the Government admits that in those states where by law the age of consent is fixed at a less mature age than sixteen (16), the Federal Statute, to wit, S. 458, 18, U. S. C. would cover; but in those states where an age higher than sixteen (16) is fixed by local law, then the Federal Statute could not be invoked, but the State Statute would apply by "adoption."

This is but to assert, that there is not a total repeal by implication and judicial construction, but only a partial repeal.

A partial repeal by judicial construction is as much at variance with precedent and logic as is an attempt at total repeal. In any event there results judicial usurpation of legislative functions. It would be needless to cite case law at length upon this contention, as the principle is fundamental.

> "The statute should not be construed to include cases omitted by the legislature."

Gutterson v. Pearson, 189 N. W. 458, 24 A. L. R. 519."

> "The presumption is always against the intention to repeal where express terms are not used ***** It would be *** unreasonable to suppose that a legislative body intended, by doubtful inference, to repeal salutary provisions in a very early statute, which in numerous enactments, it has cautiously preserved."

25 R.C.L., **Statutes**, S. 169.

We concede that section 45-4901, Arizona Code, is not attempted to be applied as State law as such, but yet the result of the application of section 468, here being considered is nevertheless to apply such State law by "adoption."

While the case is not precisely in point, we think that the reasoning in the decision of *Davis v. Beason*, 133 U. S. 333, 33 L. Ed. 637, at page 642, clarifies

somewhat the contention which we are attempting to advance, namely, that section 468 in the absence of express directions as to the repeal of section 458, did not effect a change or alteration of the latter provision.

> "The cases in which the legislation of Congress will supersede the legislation of a state or territory without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground."

It may not be amiss to consider the logical result of applying the majority conclusion below to hypothetical cases. The Federal Government by S. 516, 18, U. S. C., covers in generic terms, offenses relating to the commission of adultery and defines the ingredient elements of the offense.

Assuming, for purposes of argument, that some one of the 48 states should also provide and punish against the commission of the crime of adultery, but that in specifying the elements making up various grades of the crime that the commission of the offense by a *white* woman and a *black* man should according to local prejudices be regarded as more heinous and deserving of greater punishment.

Now assume further, that such act should be committed by the white woman and black man upon territory over which the United States had exclusive

jurisdiction. Would it be the contention of the Government that inasmuch as the Federal law only provided against the commission of adultery generally, but did not provide against the specific act of adultery between the black man and the white woman, that then section 516 would not apply but that section 468 should be invoked?

Section 453, 18, U. S. C. defines generally the elements constituting the crime of manslaughter. Assume that some one of the 48 states defined the killing of a human being while under the influence of intoxicating liquor as manslaughter, and assume further that such killing took place upon United States territory. Would the Government again contend that inasmuch as S. 453, 18, U. S. C. did not specifically enumerate as manslaughter, the act of killing while under the influence of intoxicating liquor, that then section 453 would not apply, and that the State Statute would apply by "adoption"?

We assert that these instances, show the complete fallacy of the conclusion reached by the Court below. The argument advanced by the Government, and sustained by the Court below falls of its own weight when it is followed to its logical conclusion.

The Congress spoke by virtue of S. 458, title 18, U. S. C. It asserted its own idea and its policy with respect to the age under which a female could not be presumed to give lawful consent to an act of sexual intercourse. It allowed the justifiable inference that *over* the age prescribed, a female could give lawful consent to such act. To hold otherwise would be in effect, to make of section 458, a concealed trap to

catch unwary victims. Either section 458 means what it says, or it doesn't, and the opinion below certainly results in a decision which is in conflict with applicable decisions of this Court and in conflict with decisions of other Circuit Courts of Appeal and is wholly untenable in theory and in practical application.

Point 2 (a)

Section 548, 18, U.S.C. Not Intended to Re-define Carnal Knowledge

Petitioner is not presently in the position to look a gift horse in the mouth. The Court below held that section 548 did not apply because petitioner is not an Indian. Because Counsel believes that S. 548, 18, U. S. C., as amended, would in a proper case apply, when read in conjunction with S. 217, 25, U. S. C. by virtue of *Gregorio Chavez v. United States*, 290 U. S. 357, 78 L. Ed. 360, it is therefore incumbent to touch upon this aspect so as to protect the rights of petitioner in the event that this Court should, contrary to petitioner's contentions, regard section 548 as being applicable.

The said section, as far as it is material here, provides:

> "**Section 548 (Criminal Code, Section 328.) Indians committing certain crimes; acts on reservation; rape of Indian.** All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny, etc. ******

> *Provided further*[1] that as herein used the offense rape shall be defined in accordance with the laws of the state in which the offense was committed. *******"

Petitioner now puts the question as to the applicability of the above section to the facts of this case.

We therefore are concerned with what the Congress meant by the use of the term *rape*. Did it intend, by the use of such word, to comprehend the crime of carnal knowledge?

Defendant respectfully suggests that it did not, for to have done so would have resulted in an implied repeal of S. 458, 18, U. S. C., which as before stated gives definition to the essential elements constituting the crime of carnal knowledge under Federal jurisdisprudence.

It is the contention of petitioner that Congress intended to give definition to the crime of rape to supply an omission existent in the United States laws since the Act of March 3 1825, c. 65, 4 Stat. 115. That Act is now 457, 18, U. S. C., which reads as follows:

> "**Rape.** Whoever shall commit the crime of rape shall suffer death."

The Congress had never defined the crime of rape, and in not a few early cases, the question was raised as to the validity of said section in that the crime was not defined. The matter was put at rest in the case of *Oliver v. United States*, 230 Fed. 971, where this Court decided that the term rape, as used in the Sta-

[1] Italics as indicated by U. S. C. A.

tute, carried with it the common law definition of the crime.

Inasmuch as the meaning of rape at common law necessitated evidence as to force and lack of consent, it could often occur that convictions could not be obtained where the act of sexual intercourse had been had with mere suggestion of menace or force, or perhaps by fraud or deception or the use of intoxicants, but where force as such, could not be proved.

It was to cover these kinds of cases which accounts for the amendment as we shall hereinafter show, or in other words, it was to implement the common law definition of rape so as to include the elements of constructive force.

Was Section 458, Title 18 (carnal knowledge) repealed by 1932 amendment to Section 548, Title 18?

Defendant contends that the answer to the interrogatory is definitely in the negative. It is universally held that a general statute does not repeal, by implication, a special statute unless the conflict is plain and irreconcilable.

Middletown vs. Hartford Acc. & Indem. Co.
119 F. 2d. 821.

In *Washington vs. Miller*, 235 U. S. 422, 59 L. Ed. 295, where a question arose as to the repeal of a law having to do with whether or not a statute concerning descent and distribution of Indian lands was repealed by a later Act, the Court declared in deciding that the later Act did not impliedly repeal the earlier provision:

"In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, Section 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances, we think there was no implied repeal and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (Citing cases.): Second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. (Citing cases); and third, there was, in this instance, no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

Likewise, to this same effect, see *Ex Parte Kang-Gi-Shun-Ca*, otherwise known as *Crow Dog*, 109 U. S. 557, 27 L. Ed. 1031, *Smith v. United States*, 83 Fed. 2d 631; *Ex Parte Webb*, 225 U. S. 663, 56 L. Ed. 1248.

Rape and Carnal Knowledge Distinct Offenses

Sigerella v. State, 74 A. (Del.) 1081, covers the point. There the Court held c. 127 of the Delaware

Code, 1852, providing death for sexual abuse of a female under ten (10), or for rape, was not repealed by a later 1889 statute, providing a maximum punishment of seven (7) years for taking ***, receiving ***, or harboring a female or male under eighteen (18) for purposes of sexual intercourse, on the ground and for the reason that there was no inconsistency in the statutes and they could both stand without violence to each other.

Said the Court:

> "Our Statutes provide that every person who shall carnally know and abuse any female child under the age of ten (10) years shall be imprisoned * * * not less than seven (7) nor more than ten (10) years. The punishment for rape is life. Here are two distinct offenses."

Again, the same point is enunciated in *Melton vs. State*, 23 S.W. 2d (Tenn.) 662, where it was held that:

> "The Statute of 1871, providing against carnal knowledge of a female under ten (10) years of age or upwards, without her consent or by the administering of any substance providing stupor or weakness, etc., is not repealed by later statutes, (1893-1911) which together are supposed to cover all offenses relating to rape—there being no inconsistency in the co-existence of the two statutes."

While the Arizona Code, S. 43-4901, 1939 edition, defines rape as an act of sexual intercourse accomplished with a female under the age of eighteen (18)

years, and also includes within the definition the commission of the crime by force and constructive force, nevertheless, the Arizona Courts, in dealing with the subject distinguished between the crime of rape, (1) by force or where consent is obtained by fraud or deception and (2) where the crime is committed with a female under the age of eighteen (18) years; this latter being usually distinguished as "statutory rape." *Sage v. State*, 22 Arizona 151, 195 P. 533; *Taylor v. State*, 55 Arizona 29, 97 P. 2d 927.

While section 10124 of Nevada compiled laws, 1931-41, defines carnal knowledge of a female under the age of eighteen (18) as rape, nevertheless its case law makes a distinction between the offense of carnal knowledge and rape as is evident in the case of *Nevada v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754. The case is explicit upon the point. The Court first gave the common law definition of rape, as follows:

> "The carnal knowledge of a woman, forcibly and against her will," (4 Blackstone Comm. 210),

and then went on to observe:

> "It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one, force and resistance are necessary ingredients, while to the other they are not essential; * * * this is well settled in England, where, under the provisions of several statutes, the carnal knowledge of a female under ten (10) years of age, with or without her consent, is made a 'felony.' The statutory crime is not there denominated 'rape,' and the English judges have escaped the confusion of ideas which in this country has no doubt arisen from the fact that two

> essentially different crimes have been called by the same name, leading our Courts, in some instances, to attribute to the statutory rape all the qualities of common law rape." (See cases there cited.)

The case of *Commonwealth vs. Exler*, 89 A. (Penn.) 968, is analogous to the present point of discussion.

In that case, it appears that the defendant was indicted for the crime of murder, resulting from an attempted rape. There was no evidence of force or lack of consent and it appeared, for all that was known, that the female might have consented to the act; that her death could have occurred from shock or exposure. Nevertheless, because her death occurred while an alleged sexual act was being attepted, the defendant was prosecuted under a statute which defined murder by attempted rape, to be murder in first degree.

Upon appeal, the Appellate Court held that the word "*rape*," as thus used in the statute, was used in its common law sense, and that it did not include the act of statutory rape denounced by the Acts of 1887; that as a consequence, inasmuch as no force was used and that the female was capable of giving consent, that the crime was not murder in the first degree.

Congress Has Recognized the Distinction

Congress has declared that the crime of rape and the crime of carnal knowledge are separate and distinct offenses, as evidenced by the provisions of sections 457 and 458, 18, U. S. C. In view of the distinctions noted above by the Courts of the several

states and the separate sections of the United States Code covering on the subject, petitioner re-iterates that Congress did not intend by its definition of rape in accordance with the amendment of S. 548, 18, U. S. C., to include the offense of carnal knowledge.

Section 548, Title 18, U. S. C., has been in the United States Code for years. In such section, the Congress has enumerated certain crimes, and has provided that Indians committing said designated crimes shall be subject to the same laws and to the procedure of the same Courts as are all other persons committing any of the said mentioned crimes. At no time in the history of the said Act has the crime of "carnal knowledge" been included. Among the sexual offenses, rape was the only crime named. Carnal knowledge has always been dealt with as a distinct and separate offense.

History of 1932 Amendment to Section 548, Title 18

The Amendment of 1932 was introduced at the request of the Department of the Interior. We quote in full the letter from the Secretary:

Department of the Interior,
Washington, April 23, 1932.

Hon. Lynn J. Frazier,
Chairman Committee on Indian Affairs,
United States Senate.

"My Dear Senator Frazier: There is inclosed herewith a draft of a bill to amend sections 328 and 329 of the United States Criminal Code of 1910, now sections 548 and 549, title 18, of the United States Code of 1926.

Those sections involve the question of the prosecution of Indians for offenses committed by them on

Indian reservations. Sections 2145 and 2146 of the United States Revised Statutes provide:

"Sec. 2145. Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

Sec. 2146. The preceding section shall not be construed to extend to (crimes committed by one Indian against the person or property of another Indian, nor to) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

In view of said section 2146 the United States Supreme Court in the case of United States v. Crow Dog (109 U. S. 556) held in substance that an Indian could not be prosecuted by the United States courts for the murder of another Indian, or other offense committed by one Indian against the person or property of another Indian.

Following that decision, Congress in section 9 of the act of March 3, 1885 (23 Stat. 385)), made provision for the prosecution of Indians committing a few of the most serious offenses against other Indians on Indian reservations. Said act with some modifications became section 328 of the United States Criminal Code of 1910, now section 548 of title 18 of the United States Code of 1926, which provide for prosecution of Indians for only eight specific offenses, viz, murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny.

This has been the law for about 37 years, and there is now great need for making Indians subject to more of the laws governing other citizens or residents of the United States. For instance, some serious sases arise involving rape, assault with intent to commit rape, carnal knowledge, and incest which are not now punishable because, in Federal procedure, the common-law definition of rape is followed. There are inclosed herewith sample copies of correspondence in

regard to a few cases showing circumstances deserving prosecution and punishment to some extent at least, but where, as you will observe, there could be no prosecution because of the present state of the law.

While there is to be considered, sooner or later, the larger question of making Indians subject to the same laws as other persons, that involves careful consideration of a number of related problems, the consideration of which will undoubtedly bring out much discussion and difference of opinion as to what course of action to pursue. It will also probably involve the making of new and large appropriations, a procedure not desirable at this time.

Therefore, instead of waiting until we can satisfactorily present a bill covering the larger problem, we submit the inclosed draft to extend the laws to cover a few more of the serious offenses as set forth in the bill. The enactment of this bill will be an important step forward in the administration of Indan Affairs.

The paragraph extending the provisions of the bill to section 329 of the Criminal Code and section 549 of title 18 of the 1926 code is necessary by reason of the existing law as to South Dakota. Said section 329 was passed to meet legislation of the State of South Dakota ceding to the Federal Government jurisdiction for the prosecution of the offenses named when committed on Indian reservations by any person. The above-mentioned provision in the inclosed bill increases the list of crimes for which Indians in South Dakota may be punished, but does not attempt to extend Federal jurisdiction over offenses committed by other persons and not involving Indians. It would not be advisable to extend Federal jurisdiction over these additional offenses when committed by others than Indians (and not involving Indians) without the consent of the State to such legislation, nor is it desirable to extend Federal juricdiction to such cases.

It is respectfully recommended that your committee take the necessary steps to secure this legislation at the earliest possible date.

Very truly yours,

RAY LYMAN WILBUR, Secretary.[1]

[1]Source: Indian Affairs Committee Report—Calendar No. 802, Senate Report No. 746, 72d Congress, 1st Session.

Amendment As Finally Enacted:

The amendment, as it was finally enacted by the Congress, will be found as set out in the appendix to Title 18, Section 548, U. S. C.

The Bill As First Introduced

However, the bill, as first introduced in the Senate (on April 25—Calendar day, April 27, 1932), is in the following words and figures, and we quote the same from a photostatic copy of the said bill furnished us by the Secretary of the United States Senate, at our request:

72d CONGRESS
1*st Session* S. 4511

IN THE SENATE OF THE UNITED STATES

April 25 (calendar day, April 27), 1932

Mr. Frazier (by request) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs.

A BILL

To amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled,[1] That section 328 of the United States Criminal Code of 1910 and section 548 of title 18 of the United States Code of 1926 are hereby amended to read as follows:

1. Italics from Photostatic copy

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, carnal knowledge, assault with intent to kill, assault with intent to rape,

assault with a dangerous weapon, assault with intent to do great bodily harm, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*,[1] That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further*,[2] That as herein used the offenses rape and carnal knowledge shall be defined in accordance with the laws of the State in which the offense was committed.

"The foregoing shall extend to prosecutions of Indians in South Dakota under section 329 of the United States Criminal Code of 1910 and section 549 of title 18 of the United States Code of 1926."

1. Italics from photostatic copy
2. Italics from photostatic copy

The Bill with Committee Report

The bill, as finally recommended by the Committee and enacted by the Congress on (May 9—Calendar day May 28, 1932) is quoted below in accordance with the certified copy[3] of said bill received from Edwin A. Halsey, Secretary of the Senate of the United States of America.

> "I, EDWIN A. HALSEY, Secretary of the Senate of the Uunted States of America, do hereby certify that the typewritten page hereto attached is a true, correct, and compared copy of Senate bill 4511, Seventy-second Congress, first session, to amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926, introduced in the Senate of the United States on April 25 (calendar day, April 27), 1932, by Mr. Frazier (by request), as reported by him from the Committee on Indian Affairs of the Senate, with amendments, on May 9 (calendar day, May 28), 1932; the matter proposed to be omitted by the committee being stricken through and the part proposed to be inserted being underlined.
>
> IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the Senate of the United States of America at the city of Washington, this the 1st day of September, A. D., 1944.
>
> (SEAL)
>
> EDWIN A. HALSEY,
> Secretary of the Senate of the
> Unite States.

3. Original certified copy certified to this Court as an exhibit

CALENDAR No. 802

72d Congress
1st session

S. 4511
(Report No. 746)

IN THE SENATE OF THE UNITED STATES
April 25 (calendar day, April 27), 1932

Mr. Frazier (by request) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs.

May 9 (calendar day, May 28, 1932)

Reported by Mr. Frazier, with amendments

(Omit the part struck through and insert the part printed in italic)1*

A BILL

To amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 328 of the United States Criminal Code of 1910 and section 548 of title 18 of the United States Code of 1926 are hereby amended to read as follows:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous wapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the juris-

diction of the United States Government, including rights of way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: "*Provided*, That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further*, That as herein used the *offense rape* shall be defined in accordance with the laws of the State in which the offense was committed.

"The foregoing shall extend to offenses of Indians in South Dakota under section 329 of the United States Criminal Code of 1910 and section 549 of title 18 of the United States Code of 1926."

* Part inserted by committee is shown by underlined matter.

We thus see from the historical consideration of the amendment of June 28, 1932, that there was specifically recommended to Congress the amendment of Section 548, enacting a substitute for the said section, which said substitute was to include the offense of carnal knowledge.

The bill, as introduced, designated that as one of the offenses, and the Congress had full opportunity to so declare it to be one of the enumerated offenses. Observe, also, that incest is an offense not formerly punishable by the provisions of said section; likewise, that robbery is now included by the amendment as an offense.

How can we then justify the *omission* of carnal knowledge from the substitute act, when the proposed bill from the Department of the Interior had particularly included such words? The proposed bill also included the words "incest" and "robbery". They were permitted to remain in the bill as finally enacted. Certainly, Congress must have had a reason for omitting the words "carnal knowledge".

It must be remembered that when this Act was before Congress, it was referred to the Committee on Indian Affairs, and that the Congress had as the primary matter before it, the question of increasing the list of crimes committed by Indians against other Indians. The Congress was not at all concerned with amending or changing the general criminal laws of the United States as they applied to persons other than Indians, and we suggest that it stretches the bounds of imagination to conclude that the Congress, in dealing with an Act primarily concerned with Indians, intended thereby to impliedly repeal the specific provisions of Section 458, defining the crime of carnal knowledge.

No logical reasoning can be advanced to assert that the effect of the amendment of 1932, providing that the crime of rape shall be defined according to the law where the act was committed, was thereafter to include the crime of carnal knowledge in view of the then existing specific provisions covering that kind of offense, and the further fact that the Congress purposely excluded from the proposed bill the offense of carnal knowledge.

The legislation involved in the substitute for Section 548 was principally concerned and directed to Indians. It was not at all concerned with reference to the general criminal laws of the United States.

We think the case of *Washington vs. Miller*, cited supra, applies plainly here and we paraphrase the quotation hereinbefore cited from said case: *In short, it was plainly a general statute (relating to Indians) and did not show that the attention of Congress was then particularly directed to the consideration of amending the general or specific criminal laws of the United States. On the other hand, Section 458, Title 18, defining carnal knowledge, dealt with that subject in specific and positive terms which made it certain that the offense of carnal knowledge and the age of the female concerned were particularly in mind at the time.*

Following further, the reasoning in the *Washington vs. Miller* case, we suggest to the Court that where there are two statutes upon the same subject, (definition of crimes of sexual intercourse), the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.

Townsend vs. Little
109 U. S. 504
27 L. Ed. 1012

Rogers vs. United States
185 U. S. 83,
46 L. Ed. 816

Again, is there in this instance, any irreconcilable conflict or absolute incompatibility between the provisions of Section 548 as amended and Section 458? We think not, for both statutes could be given reasonable operation. There is no positive repugnancy between the provisions of the new amendment and the provisions of Section 458. In the words of *Ex-parte Kang-Gi-Shun-Ca*, cited supra, *there was no express reference in the new amendment to the previous legislation on the subject, and there being no necessary inconsistency between the two Acts, it must be ruled that the two Acts can stand together.*

We think it is clearly manifest from our analysis of the amendment that it certainly was not the intention of the Congress to effect the repeal of Section 458 or to re-define the ingredient elements constituting the crime of carnal knowledge.

The section with which we are now dealing, e.g., Section 548, prior to June, 1932, listed only eight crimes. In its present amended form, it enumerates ten crimes.

As may be inferred from Section 218, Title 25, U. S. C., other ordinary crimes committed by Indians against Indians in Indian country were subject to punishment by the local law of the tribe.

Indian Tribal Law to Apply

Inasmuch as Congress was here dealing with a matter which was brought to its attention as exclusively affecting the Indians, and inasmuch as it was referred to the Committee on Indian Affairs, it may well be argued that the Congress thought it wiser to leave

the matter of the offense of carnal knowledge to be dealt with by the local law of the tribe or the local Indian Courts in the Indian territory where the act was committed.

This argument presents itself to us as being much more reasonable than the contention that the effect of the amendment was to raise the statutory age of females from sixteen (16) to eighteen (18) with respect to carnal knowledge and thereby impliedly repeal Section 458.

SUMMATION

As to effect of S. 468.

It is manifest from the dissenting opinion below, (R-46), that the government must admit that said S. 468 cannot logically apply in those states where by law, age of consent is fixed at a lesser age than sixteen (16), but yet the government contends that said S. 468 will apply, in those states where an age higher than sixteen (16) is fixed by local law.

There is nothing in the history of S. 468 to indicate that Congress ever intended that S. 458, 18, U. S. C., was to be repealed or superseded.

Further, there is no indication that it was intended to be effective in certain areas of the United States and not effective in other parts of the country.

However, the result of the decision below does create this unique anomaly in our system of Jurisprudence.

As to effect of S. 548.

We submit that an historical analysis of the 1932 amendment to said section will reveal that it was not the intention of Congress thereby to alter or repeal the provisions of S. 458, 18, U. S. C.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that substantial justice shall be done, and that to such an end a Writ of Certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit and, finally, reverse it.

M. J. DOUGHERTY
Counsel for Petitioner

JOHN F. CONNOR
Of Counsel for Petitioner

No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1945

CARL B. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 41–46) and dissenting (R. 46–47) opinions in the circuit court of appeals are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 30, 1945 (R. 47), and a petition for rehearing was denied May 14, 1945 (R. 48). The petition for a writ of certiorari was filed June 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Within an Indian Reservation over which the United States has exclusive jurisdiction, petitioner had carnal knowledge of an Indian girl over sixteen but under eighteen years of age. Section 279 of the Criminal Code makes it an offense carnally to know a girl under the age of sixteen years. The question presented is whether, by virtue of the assimilative crimes act (Section 289 of the Criminal Code), petitioner committed the offense of statutory rape as defined by § 43–4901 of the Arizona Code, which fixes the age of consent at eighteen years.

STATUTES INVOLVED

Section 272 of the Criminal Code (18 U. S. C. 451, Chap. 11) provides in part:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall

be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Section 279 of the Criminal Code (18 U. S. C. 458, Chap. 11) provides:

> Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.

Section 289 of the Criminal Code, commonly known as the assimilative crimes act (18 U. S. C. 468), provides:

> Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described [in section 272 of the Criminal Code] shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment.

Section 43–4901 of the Arizona Code, 1939, provides in part:

> * * * Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:
>
> Where the female is under the age of eighteen [18] years;
>
> * * * * *
>
> * * * Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five [5].

STATEMENT

On March 23, 1944, petitioner was indicted in the United States District Court for the District of Arizona in one count charging that on December 10, 1943, within the limits of the Colorado Indian Reservation in the District of Arizona, he carnally knew Geraldine Rose Ameelyenah, a female Indian who was under the age of eighteen years and who was not his wife (R. 2–3). Petitioner was convicted after a jury trial (R. 4) and was sentenced to imprisonment for a term of five years (R. 12–13). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed, one judge dissenting (R. 41–47).

The evidence in support of the conviction, the sufficiency of which petitioner does not dispute, may be briefly summarized as follows:

Petitioner is a member of the Caucasian race. He was born in 1898 and is married and has a son thirteen years of age. (R. 26–27.) Geraldine Rose Ameelyenah is a Mohave Indian who lives on the Colorado Indian Reservation in Arizona. She became sixteen years of age on August 8, 1943. (R. 23–24.) Petitioner established a Nazarene Church on the reservation and he "did missionary work as a Nazarene preacher" (R. 23–24). Geraldine was his assistant in publishing the church newspaper (R. 24). On the evening of December 3, 1943, after they had worked on the newspaper, petitioner drove Geraldine in his pick-up truck to an isolated side road, and while they were parked there, she submitted to sexual intercourse with him (R. 25).

DISCUSSION

The assimilative crimes act (Section 289 of the Criminal Code, *supra*) provides that within defined areas of exclusive federal jurisdiction,[1] any person who does an act "which is not made penal by any laws of Congress," but which would be a violation of the law of the state if it had jurisdiction, shall be deemed to have committed the offense described by state law and shall be punished as

[1] By virtue of 25 U. S. C. 217 the general laws of the United States relating to the punishment of crimes committed in any place within its exclusive jurisdiction are extended to "the Indian country." An Indian Reservation is a part of the Indian country. *Donnelly* v. *United States*, 228 U. S. 243, 269.

provided by the state law. It is undisputed that petitioner's misconduct occurred in an area within federal jurisdiction and that, since Geraldine was under 18 years of age, it would have been a violation of Arizona law if it had occurred within the state's jurisdiction. The sole question presented, therefore, is whether carnally knowing a girl over 16 but under 18 years of age is an "act * * * which is not made penal by any laws of Congress," as is required by the assimilative crimes act. This problem stems from the fact that Section 279 of the Criminal Code makes it a penal offense "carnally and unlawfully [to] know any female under the age of sixteen years." It is petitioner's view that Congress has made the act of carnally knowing a girl of tender years a crime and that, in defining the offense, it has fixed the age of consent at sixteen years. He argues, therefore, and the dissenting judge below agreed, that there is no room in this case for resort to the Arizona definition of statutory rape pursuant to the assimilative crimes act. The majority of the court below accepted the view urged in that court by the Government, that since the act of carnally knowing a girl over 16 but under 18 years of age is not made penal by any law of Congress, the assimilative crimes act is applicable and petitioner therefore committed a federal offense as defined by § 43–4901 of the Arizona Code.

To our knowledge, the question presented is one of first impression. While there are decisions un-

der the assimilative crimes act (*infra*, p. 8), none reaches the problem presented by this case. In our view, the conflicting views of the majority and dissenting opinions in the court below reflect a difference in emphasis upon the considerations which control the resolution of the question presented.

a. The argument in support of the view of the Government in the court below and of the majority of that court rests upon a literal reading of the assimilative crimes act coupled with a recognition of its underlying policy (see *infra*, p. 11, fn. 8) that, where feasible, it is desirable for the federal government to accommodate its policy in defining crimes to that of the state within whose exterior boundaries federal jurisdiction is to be exercised. The argument runs as follows: The act of carnally knowing a girl over sixteen but under eighteen years of age is not made penal by any law of Congress. Accordingly, the assimilative crimes act is applicable and reference may be had to state law to determine whether such an act is proscribed by the state. In this case, since petitioner's misconduct would have constituted a state offense if it had occurred within an area of state jurisdiction, it is desirable to recognize the policy of the state and to enforce it in areas of federal jurisdiction within the confines of the state. Such a conclusion obviates the anomaly of an act committed in the state of Arizona being criminal or innocent depending upon whether it took place on

one side of the boundary line of the Indian Reservation or the other. This does not mean that the congressional policy underlying Section 279 of the Criminal Code is disregarded. Rather, it means that Congress has set the age of sixteen as the minimum, but not the maximum, age of consent for all areas of federal jurisdiction, regardless of whether any particular state may have fixed a lower age. In cases, such as this one, where the girl is over the age of sixteen, the higher age fixed by state law applies. As is evident, this view draws its strength from the fact that it minimizes the area of possible conflict between the policies of the federal and the state governments, without departing from the fair meaning of the language of the assimilative crimes act.

b. The considerations which detract from the soundness of the decision of the court below stem principally from the legislative history of the assimilative crimes act, which is discussed in *Franklin* v. *United States*, 216 U. S. 559, and *United States* v. *Press Publishing Co.*, 219 U. S. 1, and in the dissenting opinion in *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 398–400. Briefly summarized, that history reveals that the legislation in question had its origin in the Act of March 3, 1825 (4 Stat. 115). That act was entitled, "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." Sections 1 and 2 provided for the punishment of arson and Section 3,

which was the precursor of the present assimilative crimes act, provided:

> *And be it further enacted* That, if any offence[2] shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

The remaining sections defined various offenses which it was apparently believed occurred with some frequency in the areas of federal jurisdiction enumerated in the Act. The discussions of the act in Congress indicate that its purpose was to provide for the punishment of acts committed in such areas, which therefore could not be punished by the states and which, if not prosecuted by the federal government, would go unpunished. See Gales & Seaton, Vol. I, pp. 154, 157–158.

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[2] The use of the term "offence" was abandoned when the Criminal Code was enacted, because, in the words of the House Report, "an act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H. Rep. No. 2, Part 1, p. 25 (Section 286), 60th Cong., 1st sess.

Webster, who sponsored the legislation, explained the purpose of Section 3 of the act as follows (Gales & Seaton, Vol. I, p. 338):

> As to the third section, it must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people, (a navy yard for instance,) was ceded to the United States, some provision was required for the punishment of offences; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, &c. might be. He [Webster] was persuaded that the people would not view it as any hardship, that the great class of minor offences should continue to be punished in the same manner as they had been before the cession.

It is fairly evident from Webster's comments that he anticipated that Section 3 of the act of 1825 would come into play in respect of those crimes concerning which Congress did not undertake to legislate specifically. In the words of this Court (*Franklin* v. *United States,* 216 U. S. 559, 568), "by this act [Section 3 of the Act of March 3, 1825] Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far

as said laws were not displaced by specific laws enacted by Congress."[2] For example, Congress having dealt with the subject of arson in Sections

[2] In *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–10, this Court characterized the assimilative crimes act, as follows:

"It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are 'not provided for by any law of the United States,' and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the States. * * * "

1 and 2 of the act, it is doubtful that Congress intended Section 3 to have application in any case of arson, even if the arson did not fall within the congressional definition of the crime. Taking this approach, it is argued by petitioner and by the dissenting judge in the court below that Congress has addressed itself to the subject of the carnal abuse of girls of tender years and has expressed its policy by its definition of the offense, fixing the age of consent at sixteen years. Since Congress has enacted a law making penal the act of carnal knowledge, the assimilative crimes act, it is argued, may not be used to depart from the congressional definition of the offense.

c. The legislative history of Section 279 of the Criminal Code, which originated in the Act of February 9, 1889, c. 120, 25 Stat. 658, and which fixed the age of consent at sixteen years, sheds no light on the issue present in this case. It shows that there was some question as to whether the age of consent should be fixed at 14 or 16 years and that the latter age was eventually agreed upon. Cong. Rec., 50th Cong., 2d sess., p. 997. But there is no indication that any consideration was given to the relationship of the proposed legislation to the assimilative crimes act.[4]

[4] We are unable to agree with petitioner's suggestion (Pet. 26–44) that Section 328 of the Criminal Code (18 U. S. C. 548), which relates to offenses by Indians, when construed in the light of *United States* v. *Chavez*, 290 U. S. 357, may possibly apply to his case. The *Chavez* case was concerned

CONCLUSION

While the decision of the circuit court of appeals may be supported on the grounds discussed at pp. 7–8, *supra,* the considerations militating against the validity of the decision are such that we do not feel warranted in opposing granting of the petition for a writ of certiorari.

Respectfully submitted.

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JULY 1945.

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with the question whether the federal government possessed jurisdiction to punish larceny by a non-Indian in certain Indian Country. Since Section 287 of the Criminal Code (18 U. S. C. 466) proscribes larcency by any person in areas of federal jurisdiction and the land in question was found to be such an area, the Court concluded that jurisdiction existed. The case was not concerned with a construction of Section 328 of the Criminal Code, which is expressly limited to crimes by Indians. Since petitioner is not an Indian (R. 27), it is plain that Section 328 is inapplicable to this case.

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No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1945

CARL B. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority (R. 41–46) and dissenting (R. 46–47) opinions in the circuit court of appeals are reported at 148 F. 2d 960.

JURISDICTION

The judgment of the circuit court of appeals was entered March 30, 1945 (R. 47), and a petition for rehearing was denied May 14, 1945 (R. 48). The petition for a writ of certiorari was filed June 11, 1945 and was granted October 8, 1945 (R. 49). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Within an Indian Reservation over which the United States has jurisdiction, petitioner had carnal knowledge of an Indian girl over sixteen but under eighteen years of age. Section 279 of the Criminal Code makes it an offense carnally to know a girl under the age of sixteen years. The question presented is whether, by virtue of the assimilative crimes act (Section 289 of the Criminal Code), petitioner committed the offense of statutory rape as defined by Section 43-4901 of the Arizona Code, which fixes the age of consent at eighteen years.

STATUTES INVOLVED

Section 2145 of the Revised Statutes (25 U. S. C. 217) provides:

> Except as to crimes the punishment of which is expressly provided for in [title 25], the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 272 of the Criminal Code (18 U. S. C. 451, c. 11) provides in part:

> The crimes and offenses defined in this

chapter shall be punished as herein prescribed:

* * * * *

Third. When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Section 279 of the Criminal Code (18 U. S. C. 458, c. 11) provides:

Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.

Section 289 of the Criminal Code, as amended, commonly known as the assimilative crimes act (18 U. S. C. 468, c. 11), provides:

Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described [in section 272 of the Criminal Code] shall do or omit the doing of any act or thing which is not made penal by

> any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place in situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment.

Section 43–4901 of the Arizona Code, 1939, provides in part:

> * * * Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:
>
> Where the female is under the age of eighteen [18] years;
>
> * * * * *
>
> * * * Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five [5].

STATEMENT

On March 23, 1944, petitioner was indicted in the United States District Court for the District of Arizona in one count charging that on December 10, 1943, within the limits of the Colorado River Indian Reservation in the District of Arizona, he carnally knew Geraldine Rose Ameelyenah, a female Indian who was under the age of eighteen years and who was not his wife (R. 2–3). Petitioner was convicted after a jury trial (R. 4) and

was sentenced to imprisonment for a term of five years (R. 12–13). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed, one judge dissenting (R. 41–47).

The evidence in support of the conviction, the sufficiency of which petitioner does not dispute, may be briefly summarized as follows:

Petitioner is a member of the Caucasian race. He was born in 1898 and is married and has a son thirteen years of age. (R. 26–27.) Geraldine Rose Ameelyenah is a Mohave Indian who lives on the Colorado River Indian Reservation in Arizona. She became sixteen years of age on August 8, 1943. (R. 23–24.) Petitioner established a Nazarene Church on the reservation and "did missionary work as a Nazarene preacher" (R. 23–24). Geraldine was his assistant in publishing the church newspaper (R. 24). On the evening of December 3, 1943, after they had worked on the newspaper, petitioner drove Geraldine in his pick-up truck to an isolated side road on the Indian reservation and while they were parked there she submitted to sexual intercourse with him (R. 25).

SUMMARY OF ARGUMENT

The judgment of the circuit court of appeals is supported by a literal reading of the assimilative crimes act. Since the act of having carnal knowledge of a girl over sixteen but under

eighteen years of age is not covered by Section 279 of the Criminal Code it is an act not made penal by any laws of Congress. But if we go beyond the literal language of the statute the soundness of the construction adopted by the court below is subject to serious doubt.

The legislative history of Section 279 of the Criminal Code, making it an offense carnally to know any girl under sixteen years of age, shows that Congress adopted that age limit with full knowledge that it was lower than the age limit fixed by some state laws. Congress not only found that a girl under sixteen is legally incapable of giving consent, but it must also have concluded that a girl sixteen or over, as was petitioner's victim, is capable of consenting. In addition, the history of Section 289 of the Criminal Code, the assimilative crimes act, demonstrates that Congress intended it to be applicable simply to those offenses concerning which it had not legislated. In these circumstances, we think the considerations in support of petitioner's position outweigh those in support of the judgment of the circuit court of appeals.

ARGUMENT

WHILE THE JUDGMENT OF THE COURT BELOW FINDS SUPPORT IN THE LITERAL LANGUAGE OF SECTION 289 OF THE CRIMINAL CODE, THERE ARE OTHER AND STRONGER CONSIDERATIONS WHICH MAKE AGAINST THE PROPRIETY OF THAT COURT'S CONSTRUCTION OF THE SECTION

The assimilative crimes act (Section 289 of the Criminal Code, *supra*, p. 3) provides that within

defined areas of federal jurisdiction,[1] any person who does an act "which is not made penal by any laws of Congress," but which would be a violation of the law of the state if it had jurisdiction, shall be deemed to have committed the offense described by state law and shall be punished as provided by the state law. It is undisputed that petitioner's act occurred in an area within federal jurisdiction and that, since the victim was under 18 years of age, it would have been a violation of Arizona law if it had occurred within the state's jurisdiction. The sole question presented, therefore, is whether carnally knowing a girl over 16 but under 18 years of age is an "act * * * which is not made penal by any laws of Congress," as is required for coverage by the assimilative crimes act.

The problem stems from the fact that Section 279 of the Criminal Code makes it a penal offense "carnally and unlawfully [to] know any female under the age of sixteen years." It is petitioner's view that Congress has made the act of carnally knowing a girl of tender years a crime and that, in defining the offense, it has fixed the age of consent at sixteen years. He argues, therefore, and the

[1] By virtue of 25 U. S. C. 217 the general laws of the United States relating to the punishment of crimes committed in any place within its exclusive jurisdiction are extended to "the Indian country." An Indian Reservation is a part of the Indian country. *Donnelly* v. *United States*, 228 U. S. 243, 269. *United States* v. *Pelican*, 232 U. S. 442, 445, 449; cf. *United States v. McGowan*, 302 U. S. 535, 539.

dissenting judge below agreed, that there is no room in this case for resort to the Arizona definition of statutory rape pursuant to the assimilative crimes act. The majority of the court below accepted the view urged in that court by the Government, that since the act of carnally knowing a girl over 16 but under 18 years of age, with her consent, is not made penal by any law of Congress, the assimilative crimes act is applicable and petitioner therefore committed a federal offense as defined by § 43–4901 of the Arizona Code.

So far as we know, the question is one of first impression. We think that the judgment of the circuit court of appeals is supported by a literal reading of the assimilative crimes act. By its terms the statute applies where an "act or thing" is done "which is not made penal" by any laws of Congress. The argument in support of the judgment is that while Congress, by Section 279 of the Criminal Code, has made penal the act of having carnal knowledge of a girl under sixteen years of age, it has not made penal the commission of such an act with a girl sixteen years or older. Since Geraldine had passed her sixteenth birthday, there was no law of Congress making petitioner's act penal. Accordingly, so the argument goes, the assimilative crimes act applies to this case and reference may be had to Arizona law to punish petitioner's act as a federal offense.

While the literal language of the statute permits this construction, the legislative histories of

both Sections 279 and 289 of the Criminal Code clash with it. Since this data is an aid to interpretation to which, it would seem, this Court may refer in testing the propriety of the construction adopted by the court below (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 544), we turn to the legislative background of those statutes.

A. *The Assimilative Crimes Act.*—Section 289 of the Criminal Code has had a long legislative history, which previously has been considered by this Court, and which furnished the basis for the Court's characterization of the statute in *United States* v. *Press Publishing Co.,* 219 U. S. 1, 9–10,[2] as follows:

> It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are "not provided for by any law of the United States," and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling; yet, on the other hand, where no law of the United States has expressly provided for the punish-

[2] See also *Franklin* v. *United States,* 216 U. S. 559; *Johnson* v. *Yellow Cab Co.,* 321 U. S. 383, 393 (dissent); and see *United States* v. *Paul,* 6 Pet. 141.

ment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the States. * * *

Section 289 had its origin in the recommendations of Mr. Justice Story early in the Nineteenth Century. The first federal crimes act, the

act of April 30, 1790 (1 Stat. 112), defined only the most serious offenses. As a result, many persons who committed acts in areas of federal jurisdiction which would have been criminal if state jurisdiction attached, escaped punishment. This evil was recognized by Mr. Justice Story, who thought it could be remedied by giving the United States Courts general jurisdiction to punish crimes committed against the Federal Government. In reference to a section of a bill which he prepared to this effect, Mr. Justice Story said (*Life and Letters of Joseph Story*, 1851, Vol. 1, p. 297; see also pp. 293–301):

> This is the most important section of the whole bill. The criminal code of the United States is singularly defective and inefficient. There are, in the statutes of the United States, prohibitions against doing some acts, and mandates to do others, which have no penalties annexed to them. But this is a very small grievance. Few, very few, of the practical crimes, (if I may so say,) are now punishable by statutes, and if the courts have no general common law jurisdiction, (which is a vexed question,) they are wholly dispunishable. The State ~~Courts have no~~ jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes, may in these places be now committed with impunity. Surely, in naval yards, arsenals, forts, and dockyards, and

> on the high seas, a common law jurisdiction is indispensable. Suppose a conspiracy to commit treason, in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress have power to provide for all crimes against the United States, is incontestable. * * *

Thereafter, on February 10, 1823, James Buchanan, then a member of the Judiciary Committee of the House of Representatives (Webster was its chairman), submitted a resolution that the committee be instructed to consider whether there are crimes "not now punishable by law, to which punishments ought to be affixed," so that legislation could be considered by the succeeding Congress. The resolution was adopted. Annals of Congress, 17th Cong., 2d sess., 1822–1823, p. 929.

At the second session of the next Congress,[3] Webster sponsored a bill which became the act of March 3, 1825. The bill defined those criminal

[3] At the first session a bill providing for the assimilation of the criminal laws of the States was passed by the Senate, but apparently it was not acted upon by the House of Representatives. Annals of Congress, 18th Cong., 1st Sess., 1823–1824, pp. 528, 592, 762; see also Gales & Seaton, Vol. I, p. 338.

offenses which occurred with some regularity, such as arson, murder, rape, theft, extortion and perjury, and it provided in Section 3 (See Gales & Seaton, Vol. I, p. 152):

> *And, be it further enacted* That, if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

The function of Section 3 was made explicit by Webster during consideration of the bill by the House of Representatives, sitting as a committee of the whole. Mr. Wickliffe had objected to Section 3 on the ground that it amounted to adoption by one sovereign of the laws of another without any knowledge of what they were, and that it made the law of the United States vary according to the laws of the various states.[4] Webster replied (Gales & Seaton, Vol. I, p. 338):

[4] Compare the criticism of Section 289 of the Criminal Code by Senators Black and Johnson when the 1933 amendment of Section 289 was before the Senate. 77 Cong. Rec. 5530–5532.

> As to the third section, it must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people, (a navy yard for instance,) was ceded to the United States, some provision was required for the punishment of offenses; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, &c. might be. He [Webster] was persuaded that the people would not view it as any hardship, that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession.

We think it fairly evident from this early history of Section 289, and particularly from Webster's statement, that Section 3 of the act of 1825 had for its object the establishment of a code of criminal laws for areas of federal jurisdiction without making it necessary for Congress to legislate specifically as to each crime. Thus, Congress defined the more important and more frequent offenses and left the remainder to definition by state law. Section 3, we think, was designed to come into play in respect of those crimes concerning which Congress did not undertake to legislate specifically. As the Court said in *Franklin v. United States*, 216 U. S. 559, 568, "by this act

Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws enacted by Congress."

In *United States* v. *Paul*, 6 Pet. 141, this Court held that only the state laws in effect when Section 3 was enacted were operative in areas of federal jurisdiction. Accordingly, from time to time and with minor changes not material here, principally to bring it up to date, Section 3 of the Act of March 3, 1825, has been reenacted. It is now Section 289 of the Criminal Code, as amended. Act of April 5, 1866, 14 Stat. 12, 13; § 5391 of the Revised Statutes of 1878; act of July 7, 1898, 30 Stat. 717; act of March 4, 1909, 35 Stat. 1088, 1145; act of June 15, 1933, 48 Stat. 152; act of June 20, 1935, 49 Stat. 394; act of June 6, 1940, 54 Stat. 234.

For the most part the reenactments were passed with little discussion in Congress as to the meaning of Section 289, at least in so far as it relates

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[6] The use of the term "offence" was abandoned when the Criminal Code was enacted, because, in the words of the House Report, "an act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H. Rep. No. 2, Part 1, p. 23 (Section 286), 60th Cong., 1st sess.

to the problem of this case. See, generally, Senate Rep. No. 1259, 55th Cong., 2d sess; House Executive Doc. No. 14, 53d Cong., 1st sess; H. Rep. No. 56, 73d Cong., 1st sess; H. Rep. No. 1022, 74th Cong., 1st sess; S. Rep. No. 1699 and H. Rep. No. 1584, 76th Cong., 3d sess. The 1933 amendment, however, evoked some discussion on the floor of the Senate as to the meaning of Section 289 and as to its desirability. 77 Cong. Rec. 5530–5532. Senator Black, who was in charge of the legislation, was asked to describe those offenses to which Section 289 applied. That he understood that Section 289 was designed to apply only to those offenses which were not the subject of specific legislation by Congress seems evident from the example which he gave (77 Cong. Rec. 5531–5532):

> For instance, in my State we have a Government reservation. * * * We have in the State a law which prohibits certain practices with reference to driving automobiles which may bring about the death of a person. As I understand, there is no Federal law which would protect the public from the reckless and wanton driving of automobiles on that Government reservation, although there is a highway through it. This bill would adopt the law of the State of Alabama insofar as anything done on the Government reservation is concerned, and would subject a man to prosecution for the reckless killing of a human being on the public highway through the park.

The 1940 Amendment was enacted at the instance of Attorney General Murphy, who also was of the view that Section 289 applied only to those offenses concerning which Congress had not legislated. In 1939, the Attorney General addressed identical letters to the Speaker of the House of Representatives and the Chairman of the Judiciary Committee of the Senate in which he stated, *inter alia:*

> Certain crimes committed on Federal reservations are expressly defined in the Criminal Code. This is true of grave offenses, such as murder, manslaughter, rape, assault, mayhem, robbery, arson, and larceny (U. S. C., title 18, secs. 451–467). The Congress has not, however, legislated as to other crimes committed on Federal reservations, but has provided generally that as to them, the law of the State within which the reservation is situated, shall be applicable (Criminal Code, sec. 289; U. S. C., title 18, sec. 468).

The Attorney General's explanation of the statute was adopted in the committee reports. See H. Rep. No. 1584 and S. Rep. No. 1699, 76th Cong., 3d sess.

B. *The Federal Carnal Knowledge Statute.*— Section 279 of the Criminal Code originated in the act of February 9, 1889, c. 120, 25 Stat. 658, and thus followed by more than sixty years the enactment of the assimilative crimes act. The history of the statute contains nothing indicating

that any consideration was given to the relationship of the proposed legislation to the assimilative crimes act. But it does show that in fixing the age of consent at sixteen years Congress acted with full knowledge of the ages of consent fixed by various state laws and that it thus made an informed choice in fixing the age of consent. The bill as originally passed by the House of Representatives fixed the age at fourteen years. In the Senate the age was raised to sixteen years and the House thereafter concurred in the Senate amendment. 20 Cong. Rec. p. 997. Senator Faulkner, who had charge of the bill in the Senate, explained during the course of a colloquy in that body that (19 Cong. Rec. 6501):

> * * * the age was fixed by the committee after considerable discussion and examination of the laws of several States. Some of the States have changed their laws. A number of the States have fixed the age of sixteen. Some of them have fixed as high as eighteen. Mississippi, Colorado, and Alabama have fixed as high as eighteen.

C. *The Government's Position.*—As we indicated in our memorandum in response to the petition for a writ of certiorari, the sole argument in support of the view of the Government in the court below and of the majority of that court rests upon a literal reading of the assimilative crimes act coupled with a recognition of its underlying policy that, where feasible, it is desirable for

the Government to accommodate its policy in defining crimes to that of the state within whose boundaries federal jurisdiction is to be exercised. The argument runs as follows: The act of carnally knowing a girl over sixteen but under eighteen years of age is not made penal by any law of Congress. Accordingly, the assimilative crimes Act is applicable and reference may be had to state law to determine whether such an act is proscribed by the state. In this case, since petitioner's act would have constituted a state offense if it had occurred within an area of state jurisdiction, it is desirable to recognize the policy of the state and to enforce it in areas of federal jurisdiction within the confines of the state. Such a conclusion obviates the anomaly whereby an act committed in the state of Arizona is criminal or innocent depending upon whether it took place on one side of the boundary line of the Indian Reservation or the other. This does not mean that the congressional policy underlying Section 279 of the Criminal Code is disregarded. Rather, it means that Congress has set the age of sixteen as the minimum, but not the maximum, age of consent for all areas of federal jurisdiction, regardless of whether any particular state may have fixed a lower age. In cases, such as this one, where the girl is over the age of sixteen, the higher age fixed by state law applies. As is evident, this view draws its strength from the fact that it minimizes the area of possible conflict

between the policies of the federal and the state governments, without departing from the language of the assimilative crimes act.

This view, however, runs counter to the congressional intent reflected by the legislative histories of Sections 279 and 289. In respect of the carnal knowledge statute, we know that Congress gave careful consideration to the problem of fixing an age of consent and that it recognized that the age which it fixed differed from the age adopted by some of the states. It is evident that by fixing the age at sixteen Congress not only provided that girls under sixteen were incapable of consenting to the proscribed acts, but inferentially Congress regarded girls sixteen or over as being capable of intelligently consenting to the acts in question. In these circumstances, to say that Geraldine, who had passed her sixteenth birthday, could not consent to petitioner's act because Arizona law made her incapable of consenting is to subordinate the congressional policy to that of the state.

Unless Section 289 of the Criminal Code requires this, there is no basis for so subordinating the Congressional policy. While the assimilative crimes act, as this Court has indicated, is designed to permit the federal government to interfere as little as possible with the policies of the states so far as the punishment of crime is concerned, we are not convinced that Section 289 requires or permits resort to Arizona law in this case. As we have seen, the legislative history of Section 289

shows that Congress intended that there should be resort to state law in respect of those offenses concerning which it did not undertake to legislate specifically. Conversely, as to those offenses which Congress specifically defined and made punishable it did not intend that resort should be had to state law. This seems to have been the view of succeeding Congresses which have brought Section 289 up to date and, as reflected by Attorney General Murphy's letter (*supra*, pp. 16–17) recommending the 1940 amendment, it evidently has been the view of the Department of Justice. Congress, of course, was free to fix policy for areas of federal jurisdiction even though it might conflict with local policy, and we think it has done so in respect of the instant situation. These considerations, we think, outweigh the considerations in support of the judgment of the court below.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 123.—October Term, 1945.

Carl B. Williams, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 1, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This case turns upon the applicability of the Assimilative Crimes Act, § 289, Criminal Code, 54 Stat. 234, 18 U. S. C. § 468, which reads:

> "Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 272 of the Criminal Code (U. S. C., title 18, sec. 451),[1] shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment."

The petitioner, a married white man, was convicted in the District Court of the United States for the District of Arizona, of having had sexual intercourse in 1943, within the Colorado River Indian Reservation in Arizona, with an unmarried Indian girl who was then over 16, but under 18, years of age. There was no charge or evidence of use of force by the petitioner or

[1] "Sec. 272. The crimes and offenses defined in this chapter [§§ 272-289, 18 U. S. C. §§ 451-468] shall be punished as herein prescribed:

. . . . . .

"Third. *When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof*, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building." (Italics supplied.) 35 Stat. 1142, as amended by 54 Stat. 304, 18 U. S. C. § 451.

of lack of consent by the girl. The Circuit Court of Appeals affirmed the judgment by a divided court. We granted certiorari under § 240(a) of the Judicial Code because of the importance of the case in interpreting the Assimilative Crimes Act.

It is not disputed that this Indian reservation is "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof,"[2] or that it is "Indian country" within the meaning of Rev. Stat. § 2145.[3] This means that many sections of the Federal Criminal Code apply to the reservation, including not only the Assimilative Crimes Act, but also those making penal the offenses of rape,[4] assault with intent to commit rape,[5] having carnal knowledge of a girl,[6] adultery[7] and fornication.[8]

While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians,[9] the laws and courts of the United

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[2] See note 1.

[3] "Except as to [certain crimes not material here] . . . the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, . . . shall extend to the Indian country." Rev. Stat. § 2145, 25 U. S. C. § 217. Donnelly *v.* United States, 228 U. S. 243, 269; Ex parte Crow Dog, 109 U. S. 556; United States *v.* Chavez, 290 U. S. 357; United States *v.* McGowan, 302 U. S. 535; Cohen, Handbook of Federal Indian Law, pp. 5, *et seq.*, and 358, *et seq.*

[4] "Whoever shall commit the crime of rape shall suffer death." Criminal Code, § 278, 35 Stat. 1143, 18 U. S. C. § 457.

[5] "Whoever shall assault another with intent to commit . . . rape, shall be imprisoned not more than twenty years. . . ." Criminal Code, § 276, 35 Stat. 1143, 18 U. S. C. § 455.

[6] "Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years." Criminal Code, § 279, 35 Stat. 1143, 18 U. S. C. § 458.

[7] ". . . the offenses defined in this chapter [§§ 311-322] shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." Criminal Code, § 311, 35 Stat. 1148, 18 U. S. C. § 511.

"Whoever shall commit adultery shall be imprisoned not more than three years; . . . and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." Criminal Code, § 316, 35 Stat. 1149, 18 U. S. C. § 516.

[8] "If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months." Criminal Code, § 318, 35 Stat. 1149, 18 U. S. C. § 518.

[9] People of the State of New York *ex rel.* Ray *v.* Martin, No. 158, decided January 7, 1946; United States *v.* McBratney, 104 U. S. 621; Draper *v.* United States, 164 U. S. 240.

States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.[10]

The conviction cannot be sustained under the federal definitions of rape or assault with intent to rape, because the federal crime of rape carries with it the requirement of proof of the use of force by the offender and of an absence of consent by the victim. *Oliver* v. *United States*, 230 Fed. 971. Neither of these elements was charged or proved here. The federal crime of having carnal knowledge of a girl requires proof that she was under 16 years of age at the time of the offense, whereas here the indictment charged merely that she was under 18 and the proof showed that she was between 16 and 18. While the indictment did not state whether or not the petitioner was an Indian or whether or not he was married, the undisputed evidence showed that he was a married white man.

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[10] Donnelly v. United States, *supra*; United States v. Pelican, 232 U. S. 442; United States v. Ramsey, 271 U. S. 467; United States v. Chavez, *supra*. Cohen, Handbook of Federal Indian Law, pp. 364-365, 146-148. This has not always been as clear as it is now. In 1896, this Court, following United States v. McBratney, *supra*, held, in Draper v. United States, *supra*, that the state courts, and not the federal courts, had jurisdiction over a murder on an Indian reservation in the State of Montana, by one person not an Indian of another not an Indian. The effect of this went so far that in 1902, the Committee on the Judiciary of the House of Representatives reported that, "As the law now stands . . . offenses committed by half-breeds or white persons, whether upon an Indian or other person, are not cognizable by the Federal Courts and generally go unpunished. This state of the law is causing serious conditions of disorder within these Indian reservations." H. R. Rep. No. 2709, 57th Cong., 1st Sess., p. 1. After a cession of jurisdiction by the State and after being memorialized to do so by the legislature of South Dakota, Congress, in 1903, granted jurisdiction specifically to the courts of the United States for the District of South Dakota over actions charging any person with certain major crimes committed within any Indian reservation in that State. 32 Stat. 793; 35 Stat. 1151; 36 Stat. 1167; 18 U. S. C. § 549. This Court, however, in 1913, in Donnelly v. United States, *supra*, at pp. 271-272, said: "Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper Cases*. This was in effect held, as to crimes committed *by* the Indians, in the *Kagama Case*, 118 U. S. 375, 383, ... This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." We find no material special legislation on this subject affecting Arizona except its Enabling Act. 36 Stat. 568, 572. That Act contains provisions similar to those applicable to Montana, considered in Draper v. United States, *supra*, and to those applicable to New Mexico, considered in United States v. Chavez, *supra*.

However, the offense charged comes within the statutory definition of "rape" in § 43-4901 of the Arizona Code.[11] That section expands the crime of "statutory rape" so as to include sexual intercourse with a girl under 18 instead of merely with a girl under 16. Accordingly, the question here is whether or not the Assimilative Crimes Act makes this section applicable to Indian reservations in Arizona. The question extends not only to the definition of the offense but also to the punishment prescribed. The Arizona Code fixes the punishment for its violation in those instances where violations would not come within § 279 of the Federal Criminal Code. Under those circumstances, on an Indian reservation in Arizona, the statutory punishment, fixed by § 279 of the Federal Criminal Code, for a man, not an Indian, who had carnal knowledge of an Indian girl under 16, would be imprisonment for not more than 15 years for the first offense and not more than 30 years for a subsequent offense, with no minimum sentence specified. On the same facts, except that the girl be between 16 and 18, the punishment, fixed by the Arizona Code, would be imprisonment for life or for any term not less than five years. This would impose a more stringent range of punishment, including the minimum sentence of five years imposed in this

[11] Arizona's definition of rape and the punishment that Arizona prescribes for its commission differ from those relating either to rape or carnal knowledge under the Federal Criminal Code. These differences well illustrate the confusing variations from the definition of a federal crime and from provisions for its punishment which would have to be considered if indictments were permitted under the Assimilative Crimes Act for every act committed within a federal enclave and which might come within a state's enlargement of the federal definition of the same offense. Section 43-4901 of the Arizona Code of 1939 provides:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

"Where the female is under the age of eighteen [18] years;

"Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;

"Where she resists, but her resistance is overcome by force or violence;

"Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic, or anaesthetic substance, administered by or with the privity of the accused;

"Where she is at the time unconscious of the nature of the act, and this is known to the accused;

"Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused, with intent to induce such belief. . . .

"Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five [5]."

case, upon what Congress in its Criminal Code evidently had treated as a lesser offense.

We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery[12] and (2) the offense known to Arizona as that of "statutory rape"[13] has been defined and prohibited by the Federal Criminal Code,[14] and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. This is especially clear in the present case because the specified acts which would come within the additional scope given to the offense by the State through its postponement of the age of consent of the victim from 16 to 18 years of age, are completely covered by the federal crimes of adultery or fornication.[15] The interesting legislative history of the Assimilative Crimes Act[16] discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a state's definition of it. It has not even been suggested that a conflicting state definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting state definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of ~~amending~~ modifying or repealing existing provisions of the Federal Code.

Where offenses have been specifically defined by Congress and the public has been guided by such definitions for many years, it is not natural for Congress by general legislation to amend

[12] See note 7, *supra*.

[13] See note 11, *supra*, and for the use of this designation of the crime in Arizona see Sage *v.* State, 22 Ariz. 151, and Taylor *v.* State of Arizona, 55 Ariz. 29.

[14] See note 6, *supra*.

[15] See notes 7 and 8, *supra*.

[16] See United States *v.* Press Publishing Co., 219 U. S. 1, 10-13, and Johnson *v.* Yellow Cab Co., 321 U. S. 383, 398-401.

such definitions or the punishments prescribed for such offenses, without making clear its intent to do so.[17] On the other hand, it is natural for Congress from time to time, through renewals of the Assimilative Crimes Act, to use local statutes to fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses.

That the attorneys for the Government have recognized the force of some of these considerations is apparent from the following statement at the close of their brief:

> "Congress, of course, was free to fix policy for areas of federal jurisdiction even though it might conflict with local policy, and we think it has done so in respect of the instant situation. These considerations, we think, outweigh the considerations in support of the judgment of the court below."

The first Federal Crimes Act, approved April 30, 1790, 1 Stat. 112, dealt primarily with subjects over which the Constitution had expressly given jurisdiction to the Federal Government. For example, it dealt with treason, crimes upon the high seas and counterfeiting of securities of the United States. In so far as it related to federal enclaves, it recognized and provided punishment for the offenses of "wilful murder" and manslaughter if committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." § 3, 1 Stat. 113. It

[17] In Ex parte Crow Dog, 109 U. S. 556, 570-571, Mr. Justice Matthews, writing for the court, said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *generalia specialibus non derogant*. 'The general principle to be applied', said Bovill, C. J., in Thorpe *v.* Adams, L. R. 6 C. P. 135, 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald *v.* Champneys, 30 L. J. N. S. Eq. 782; 2 Johns. and Hem. 31-54, 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

In Franklin *v.* United States, 216 U. S. 559, 568, in referring to the Assimilative Crimes Act, it was said, "by this act Congress adopted for the government of the designated places, . . . the criminal laws then existing in the several States within which such places were situated, *in so far as said laws were not displaced by specific laws enacted by Congress.*" (Italics supplied.)

contained nothing corresponding directly to the Assimilative Crimes Act.[18]

On February 10, 1823, James Buchanan, then serving his first term in the House of Representatives, clearly stated the need for the recognition of additional federal crimes. He secured the adoption of a Resolution "That the Committee on the Judiciary be instructed to inquire whether there be any, and, if any, what, crimes not now punishable by law, to which punishments ought to be affixed." Annals of Congress, 17th Cong., 2d Sess. (1822-1823) 929.[19]

In the second session of the next Congress,[20] Daniel Webster, Chairman of the Committee of the Judiciary of the House of Representatives, sponsored the bill which became the Federal Crimes Act of March 3, 1825. After extended debate,[21] Congress

[18] Its nearest approach to an Assimilative Crimes Act was in its definition of piracies. It provided in § 8 that "if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; . . . ." 1 Stat. 113. This corresponds to the plan in certain English statutes (e.g. 28 Henry VIII, c. 15 (1536); 33 George III, c. 37 (1798)) for supplementing their Maritime Law with "other offenses" known to the common law. There was no attempt to enlarge the definitions of existing crimes under the Maritime Law by cross reference to broader definitions under the common law. When the Assimilative Crimes Act later appeared in the Federal Criminal Code, it followed this general form of statement.

[19] "In offering this resolution, Mr. B. said, it has been decided that the courts of the United States had no power to punish any act, no matter how criminal in its nature, unless Congress have declared it to be a crime, and annexed a punishment to its perpetration. Offences at the common law, not declared such by acts of Congress, are therefore not within the range of the jurisdiction of the Federal courts. Congress have annexed punishments but to a very few crimes, and those all of an aggravated nature. The consequence is, that a great variety of actions, to which a high degree of moral guilt is attached, and which are punished as crimes at the common law, and by every State in the Union, may be committed with impunity on the high seas, and in any place where Congress has exclusive jurisdiction. To afford an example: An assault and battery, with intent to commit murder, may be perpetrated, either on the high seas, or in a fort, magazine, arsenal, or dock-yard, belonging to the United States, and there exists no law to punish such an offence.

"This is a palpable defect in our system, which requires a remedy; and it is astonishing that none has ever yet been supplied." Annals of Congress, 17th Cong., 2d Sess. (1822-1823) 929.

[20] In its first session, a bill for some assimilation of the criminal laws of the states passed the Senate, but apparently was not acted upon by the House. Annals of Congress, 18th Cong., 1st Sess. (1823-1824) 528, 592, 762. See also, 1 Gales & Seaton, Register of Debates in Congress, 338.

[21] 1 Gales & Seaton, Register of Debates in Congress, 152-158, 335-341, 348-355, 363-365.

expanded the list of enumerated federal crimes. It also added the § 3 which became the basis of the Assimilative Crimes Act of today:

> ". . . if any offence shall be committed in any of the places aforesaid,[22] the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state." 4 Stat. 115.

This was amended in 1866, 14 Stat. 13, and in 1874 it was incorporated in the Revised Statutes as § 5391 in substantially its then existing form. For many years it thus referred to an "offense" which is not prohibited or the punishment of which "is not specially provided for, by any law of the United States."[23] A similar provision was enacted in 1898 in 30 Stat. 717. In 1909, however, in codifying the Federal Criminal Code, this section was slightly changed when it was incorporated in that Code as § 289 in substantially its present form. The word "offense" was changed so as to avoid the use of it as referring to an action which had not been prohibited and, therefore, technically could not be an "offense." Possibly this change of the old phrase into the phrase "any act or thing which is not made penal by any laws of Congress" led to the present attempt to interpret it in a specific sense as referring to individual acts of the parties rather than in a generic sense referring to acts of a general type or kind. The new words, in the light of the Congressional Com-

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[22] ". . . any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of the United States, or on the site of any lighthouse, or other needful building belonging to the United States . . . ." 4 Stat. 115, § 1.

[23] "If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States." Rev. Stat. § 5391.

mittee's explanation of them,[24] cannot, however, be regarded as changing the scope of the Act so substantially as to make it amend and enlarge the definition of an existing federal offense as well as to cover the case where an "offense" had not been prohibited. To do so would be contrary to the expressed purpose of the Committee to continue, rather than to change, its original meaning. In the instant case not only has the generic act been covered by the definition of having carnal knowledge, but the specific acts have been made "penal" by the definition of adultery. The subsequent amendments[25] have been made merely to advance the dates as of which the assimilated local statutes must have been in force. The last amendment, in 1940, followed an explanation of the bill in identical letters from the Attorney General to the Speaker of the House of Representatives and to the Chairman of the Senate Committee on the Judiciary. These letters adopted the view that the Act was to cover crimes on which Congress had not legislated and did not suggest that the Act was to enlarge or otherwise amend definitions of crimes already contained in the Federal Code.[26]

As to the particular offense involved in this case, the legislative history shows an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation. In the Federal Crimes Act of 1825, 4 Stat. 115, rape was prohibited

[24] The Committee's statement as to the new section was:

"Section 5391, Revised Statutes, provides that if any 'offense' be committed, etc., which 'offense' is not prohibited or punished by any law of Congress, such 'offense' shall receive the same punishment as is attached thereto by the law of the State within which the place upon which it is committed is situated.

"An act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H. R. Rep. No. 2, 60th Cong., 1st Sess., p. 25. See also, notes on the decision in the instant case below. 59 Harv. L. Rev. 131; 45 Col. L. Rev. 972; and see United States v. Franklin, 173 Fed. 163, writ of error dismissed, 216 U. S. 559, 568.

[25] 48 Stat. 152; 49 Stat. 394; 54 Stat. 234.

[26] "Certain crimes committed on Federal reservations are expressly defined in the Criminal Code. This is true of grave offenses, such as murder, manslaughter, rape, assault, mayhem, robbery, arson, and larceny (U. S. C., title 18, secs. 451-467). The Congress has not, however, legislated as to other crimes committed on Federal reservations, but has provided generally that as to them, the law of the State within which the reservation is situated, shall be applicable (Criminal Code, sec. 289; U. S. C., title 18, sec. 468)." Quoted in H. Rep. No. 1584, 76th Cong., 3d Sess., p. 2 and S. Rep. No. 1699, 76th Cong., 3d Sess., p. 1.

and made punishable only within certain areas under the admiralty and maritime jurisdiction of the United States. In the same Act, the assimilative crimes section was applied to federal enclaves.[27] It thus provided, the original federal prohibition of such conduct in those areas. If Congress had been satisfied to continue to apply local law to this and related offenses it would have been simple for it to have left the offense to the Assimilative Crimes Act. A contrary intent of Congress has been made obvious. Congress repeatedly has increased its list of specific prohibitions of related offenses and has enlarged the areas within which those prohibitions are applicable. It has covered the field with uniform federal legislation affecting areas within the jurisdiction of Congress.[28]

When Congress thus enacted the statute as to carnal knowledge in 1889 it gave special attention to the age of consent. The House of Representatives fixed the age at 14 and the Senate changed it to 16. 20 Cong. Rec. 997.[29]

For these reasons, we believe that the Assimilative Crimes Act does not make the Arizona Code applicable to the facts of this case. The judgment of the Court of Appeals accordingly is

Reversed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[27] See note 22, *supra*.

[28] Rape: (1825) 4 Stat. 115, applied to the high seas but not to federal enclaves; (1874) Rev. Stat. § 5345 applied to federal enclaves; (1909) 35 Stat. 1143. Assault with intent to commit rape: (1825) 4 Stat. 121, on high seas but not within federal enclaves: (1874) Rev. Stat. § 5346; (1909) 35 Stat. 1143. Carnal knowledge: (1889) 25 Stat. 658, age of consent fixed at 16; (1909) 35 Stat. 1143. Adultery: (1887) 24 Stat. 635, in connection with the amendment of bigamy statutes; (1909) 35 Stat. 1149. Fornication: (1887) 24 Stat. 636, in connection with revision of bigamy statutes; (1909) 35 Stat. 1149. See also, Criminal Code, § 312, obscene literature (1873); § 313, polygamy (1862); § 314, unlawful cohabitation (1882); § 317, incest (1887). 18 U. S. C. §§ 512-517.

[29] Senator Faulkner, in charge of the bill, said: " . . . the age was fixed by the committee after considerable discussion and an examination of the laws of the several States. Some of the States have changed their laws. A number of the States have fixed the age of sixteen. Some of them have fixed as high as eighteen. Mississippi, Colorado, and Alabama have fixed as high as eighteen." 19 Cong. Rec. 6501.